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No. _____

In the Supreme Court of the United States

CENTER FOR BIO-ETHICAL REFORM, INC., et al.,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit's decision directly conflicts with the Colorado Supreme Court's decision on whether federal law preempts local ordinances prohibiting tow-banner aircraft operations approved by the Federal Aviation Administration ("FAA"). The Ninth Circuit held that such ordinances are not preempted, contrary to the Colorado Supreme Court's holding, thereby creating decisional conflict on an important issue of federal law that has national implications.

Allowing state and local governments to regulate tow-banner operations in the navigable airspace, as the Ninth Circuit has done, will cause a patchwork of regulations that would force aircraft pilots to change altitude and direction every time they cross city, county, or state borders, creating unacceptable safety risks and placing an undue burden on travel and commerce. The navigable airspace is a channel of commerce that is also a federally designated forum for aerial expression. Federal laws and regulations ensure that there is one uniform system of commerce and travel via this navigable airspace. Local ordinances, such as the one at issue here, which regulate FAA approved flight operations threaten to undermine the uniformity of control of the navigable airspace that is necessary for the safe and efficient operation of aircraft.

1. Whether federal law preempts local ordinances prohibiting tow-banner aircraft operations approved by the Federal Aviation Administration.

2. Whether the navigable airspace is a federally designated public forum for aerial political speech such that a total ban on this form of expression violates the First Amendment.

PARTIES TO THE PROCEEDING

The Petitioners are Center for Bio-Ethical Reform, Inc. ("CBR"), a political advocacy group, and Gregg Cunningham, the executive director of CBR ("Petitioners").

The Respondents are the City and County of Honolulu, Peter Carlisle, in his official capacity as the City and County of Honolulu Prosecuting Attorney, Boisse P. Correa, in his official capacity as Chief of Police, Honolulu Police Department, successor to Lee D. Donohue ("Respondents").

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

ORDINANCE INVOLVED 2

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

A. PETITIONERS' AERIAL POLITICAL SPEECH 3

B. THE HONOLULU ORDINANCE 4

C. FAA PRONOUNCEMENTS AND REGULATIONS 6

1. FAA Notice 6

2. FAA Letter 8

3. FAA Handbook Changes 9

REASONS FOR GRANTING THE PETITION 11

I. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DECISION BY THE COLORADO SUPREME COURT 11

II. THE HONOLULU ORDINANCE VIOLATES THE FIRST AMENDMENT 15

A. THE NAVIGABLE AIRSPACE IS A FEDERALLY DESIGNATED PUBLIC FORM. 15

B. PETITIONERS' AERIAL BANNERS ARE PROTECTED SPEECH 18

C. THE HONOLULU ORDINANCE IS AN UNREASONABLE, CONTENT-BASED RESTRICTION ON POLITICAL SPEECH . . . 20

1. The Honolulu Ordinance Is a Content-Based Regulation in Violation of the First Amendment 21

2. The Honolulu Ordinance Is a Total Ban on an Entire Medium of Expression in Violation of the First Amendment 22

CONCLUSION 26

APPENDIX

Appendix A:
7/6/06 Circuit Court Order Denying Rehearing and Amending Opinion 1a

Appendix B:
7/6/06 Circuit Court Amended Opinion 4a

Appendix C:
11/9/04 District Court Order Granting Defendants' Motion for Summary Judgment; Order Denying Plaintiffs' Motion for Summary Judgment 28

Appendix D:
Revised Ordinance of Honolulu 57a

Appendix E:
FAA Certificate of Authorization 59a

Appendix F:
FAA Notice 65a

Appendix G:
Excerpts from FAA Handbook 68a

Appendix H:
7/31/03 FAA letter 77a

TABLE OF AUTHORITIES

Cases

Banner Adver., Inc. v. City of Boulder,
868 P.2d 1077 (Colo. 1994) . . . . . *passim*

Children of the Rosary v. City of Phoenix,
154 F.3d 972 (9th Cir. 1998) 17

City of Ladue v. Gilleo,
512 U.S. 43 (1994) . . . . . *passim*

City of Burbank v. Lockheed Air Terminal, Inc.,
411 U.S. 624 (1973) 16

City of Cincinnati v. Discovery Network, Inc.,
507 U.S. 410 (1993) 21

Consolidated Edison Co. v. Public Serv. Comm'n,
447 U.S. 530 (1980) 21

Cornelius v. NAACP Legal Defense & Educ. Fund,
473 U.S. 788 (1985) 15, 19

Hill v. Colorado,
530 U.S. 703 (2000) 18

Hines v. Davidowitz,
312 U.S. 52 (1941) 13, 14

Jamison v. Texas,
318 U.S. 413 (1943) 22, 23

Lovell v. C. . f Griffin,
303 U.S. 444 (1938) 22

Martin v. City of Struthers,
319 U.S. 141 (1943) 23

Members of the City Council v. Taxpayers for Vincent,
466 U.S. 789 (1984) 23

Metromedia, Inc. v. City of San Diego,
453 U.S. 490 (1981) 20, 21, 22

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) 18, 19

National Adver. Co. v. City of Orange,
861 F.2d 246 (9th Cir. 1988) 19

New York Magazine v. Metropolitan Transp. Auth.,
136 F.3d 123 (2d Cir. 1998) 16

Northwest Airlines, Inc. v. Minnesota,
322 U.S. 292 (1944) 16

Planned Parenthood Ass'n/Chicago Area v.
Chicago Transit Auth.,
767 F.2d 1225 (7th Cir. 1985) 16

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) 21

Ray v. Atlantic Richfield, Co.,
435 U.S. 151 (1978) 14

Rosenberger v. Rector & Visitors of the Univ. of Va.,
515 U.S. 819 (1995) 21

S.O.C., Inc. v. County of Clark,
152 F.3d 1136 (9th Cir. 1998) 21

Schad v. Mount Ephraim,
452 U.S. 61 (1981) 23

Schneider v. New Jersey,
308 U.S. 147 (1939) 19

Skysign Int'l, Inc. v. City & County of Honolulu,
276 F.3d 1109 (9th Cir. 2002) 6, 7

Terminiello v. City of Chicago,
337 U.S. 1 (1949) 19

United States v. Grace,
461 U.S. 171 (1983) 18

Constitutional Amendments

U.S. Const. art. VI, cl. 2 1

U.S. Const. amend. I 1

Statutes and Rules

14 C.F.R. § 91.311 (2004) 4, 6, 17

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 3

28 U.S.C. § 1331 2

28 U.S.C. § 1343(a)(3) 2

42 U.S.C. § 1983 2

49 U.S.C. § 40103 16

49 U.S.C. § 40103(b)(2)(A) 5

Rev. Ordinance of Honolulu § 21-7.20 25

Rev. Ordinance of Honolulu § 21-7.30 (b), (c) 24

Rev. Ordinance of Honolulu § 29-14.1 et seq. 25

Rev. Ordinance of Honolulu § 40-6.1 (1996) . . . . *passim*

Fed. R. Evid. 201 7

Other

2 FAA Order 8700.1, *General Aviation Operations Inspector's Handbook* . . . . . *passim*

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The order denying rehearing and amending the opinion, App. 1a, and the amended opinion, App. 4a, appear at 455 F.3d 910. The district court's opinion, App. 28a, appears at 345 F. Supp. 2d 1123.

JURISDICTION

The opinion of the panel was issued on May 23, 2006, and amended on July 6, 2006. A petition for panel rehearing and a petition for rehearing en banc were denied on July 6, 2006. App. 1a-3a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

The First Amendment of the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

ORDINANCE INVOLVED

This case presents a constitutional challenge to the Revised Ordinance of Honolulu § 40-6.1 (1996), which is set forth in full in the appendix. App. 57a-58a.

STATEMENT OF THE CASE

Petitioners filed a complaint pursuant to 42 U.S.C. § 1983, challenging the constitutionality of § 40-6.1 of the Revised Ordinances of Honolulu ("Honolulu Ordinance") under the First and Fourteenth Amendments to the United States Constitution and the Supremacy Clause of the United States Constitution.[1] Petitioners use aerial banners towed by aircraft to express a political message throughout the United States pursuant to FAA authorization. The Honolulu Ordinance prohibits Petitioners from engaging in their FAA approved flight operations in Honolulu, Hawaii.

The parties filed cross-motions for summary judgment. On November 9, 2004, the district court granted Respondents' motion, and judgment was entered in their favor. The district court held, *inter alia*, that the FAA's system of issuing "certificates" authorizing tow-banner aircraft operations did not constitute federal preemption of local regulations banning such operations. The district court also held that the navigable airspace above Honolulu was a non-public forum and, therefore, the Honolulu Ordinance did

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[1] The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 1343(a)(3).

not violate the First Amendment because the restriction was reasonable and viewpoint neutral. Petitioners appealed.[2]

On May 23, 2006, the Ninth Circuit affirmed. Petitioners timely filed a petition for panel rehearing and a petition for rehearing en banc. On July 6 2006, the Ninth Circuit denied Petitioners' requests for rehearing and amended its opinion.

STATEMENT OF FACTS

A. PETITIONERS' AERIAL POLITICAL SPEECH.

Petitioner CBR is a political advocacy group that expresses an anti-abortion message by displaying large aerial banners with images of aborted fetuses over heavily populated areas, including over beaches and other public areas, throughout the United States. Petitioner Cunningham is the executive director of CBR.

Petitioners have flown their aerial banners in California, Florida, Georgia, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, and Wisconsin pursuant to FAA authorization.

The FAA expressly authorizes Petitioners to fly their aerial banners in "the contiguous United States of America, Alaska, Hawaii, and Puerto Rico" pursuant to Petitioners' Certificate of Authorization. App. 8a, 59a. This certificate is valid in every jurisdiction in the United States. It does not contain any special provisions subjecting Petitioners' tow-

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[2] The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

banner activity to State or local ordinances that prohibit or restrict such operations. And it expressly states that Petitioners are "authorized" to engage in "aerial advertisement banner towing" in "Hawaii." App. 8a, 59a.

Without FAA authorization, Petitioners could not engage in tow-banner aircraft operations, and Respondents are without authority to permit such operations because the FAA has completely occupied this field. *See* 14 C.F.R. § 91.311 (2004) ("No pilot of a civil aircraft may tow anything with that aircraft . . . except in accordance with the terms of a certificate of waiver issued by the Administrator.").

B. THE HONOLULU ORDINANCE.

Although the FAA permits Petitioners to fly their aerial banners throughout the United States, the Honolulu Ordinance prohibits them from doing so in Honolulu because it is a total ban on aerial tow-banner operations. However, the ordinance does permit certain commercial aerial speech, while prohibiting all forms of political aerial speech.

The Honolulu Ordinance states, in relevant part, "[N]o person shall use any type of aircraft or other self-propelled or buoyant airborne object to display in any manner or for any purpose whatsoever any sign or advertising device." App. 57a.

For purposes of the ordinance, "a 'sign or advertising device' includes, but is not limited to, a poster, banner, writing, picture, painting, light, model, display, emblem, notice, illustration, insignia, symbol or any other form of advertising sign or device." App. 57a.

The Honolulu Ordinance does "not prohibit the display of an identifying mark, trade name, trade insignia, or trademark on the exterior of an aircraft or self-propelled or buoyant airborne object if the displayed item is under the ownership or registration of the aircraft's or airborne object's owner." App. 57a (emphasis added). Therefore, airlines such as Northwest and American can advertise their own companies via aerial advertising (*i.e.*, the large and visible markings and paint schemes on the sides of their aircraft), and Goodyear, Fuji Film, and MetLife can do the same with the advertisements on the sides of their blimps.[3] However, the Honolulu Ordinance prohibits Petitioners from engaging in any similar political advertising, including using Goodyear's blimp to do so.

Any person who violates the ordinance "shall, upon conviction, be punished by a fine not less than $25.00 nor more than $500.00, or by imprisonment not exceeding three months, or by both." App. 58a.

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[3] The trademark and trade name of "Goodyear" displayed in large, bold letters on the sides of its blimps is plainly commercial speech, and Northwest, American Airlines, and others display in bold letters and intricate paint schemes along the sides of their aircraft their logos and company names for advertising purposes. Undoubtedly, the intricate and eye-catching paint schemes, company names, and logos on the sides of these aircraft are for advertising purposes. The Honolulu Ordinance, however, must permit these forms of commercial speech because the FAA is responsible for prescribing regulations for "identifying aircraft," *see* 49 U.S.C. § 40103(b)(2)(A), thereby creating a dilemma for Respondents and providing further support for Petitioners' preemption argument. *See infra*.

C. FAA PRONOUNCEMENTS AND REGULATIONS.

1. FAA Notice.

On October 7, 2002, the FAA promulgated a Notice ("FAA Notice") that sought to make changes to 2 FAA Order 8700.1, *General Aviation Operations Inspector's Handbook* ("FAA Handbook"), which contains the regulations for the issuance of FAA Certificates of Authorization.[4]

The October 7th FAA Notice expired on its own terms.[5] Nonetheless, this Notice purported to delete from older versions of the FAA Handbook certain language, including "This certificate and these special provisions do not supersede any local, State or city ordinance(s) prohibiting aerial advertising." App. 66a.

The FAA Notice described the background and policy reasons for the proposed changes,[6] stating that "[t]he current

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[4] A pilot must have FAA authorization prior to engaging in tow-banner operations. *See* 14 C.F.R. § 91.311 (2004).

[5] A copy of the FAA Notice is included in the appendix. *See* App. 65a-67a.

[6] The FAA Notice was issued on the heals of the Ninth Circuit's decision in *Skysign Int'l, Inc. v. City & County of Honolulu*, 276 F.3d 1109 (9th Cir. 2002), which upheld the Honolulu Ordinance against a prior federal preemption challenge. However, based on the Notice, it was evident to Petitioners that the FAA disagreed with the outcome of *Skysign* insofar as it might be interpreted to ban tow-banner operations approved by the FAA. *See* App. 65a-67a. This Notice prompted Petitioners to file the present action. It

[FAA Handbook] contains statements that have been misinterpreted to recognize the ability of State or local governments to use their police powers to regulate banner towing and aerial advertising flight operations authorized by the [FAA]. State and local regulation of such flight operations could easily impede Federal policy and purpose and is federally preempted in circumstances including but not limited to those in which they regulate operations in navigable airspace."[7] App. 66a.

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should also be noted that Skysign was not engaging in banner towing; its violation involved the use of a lighted sign attached to the fuselage of a helicopter, and it was cited for violating Honolulu's general signage ordinance. *See id.* at 1113.

[7] In the decision below, the Ninth Circuit stated, "We give the notice no weight because it self-expired on October 7, 2003, without any change to the FAA Handbook." App. 12a. This is inaccurate in that substantial changes were made to the FAA Handbook on December 17, 2004, *see infra*, and these changes incorporate much of the FAA Notice. Petitioners requested that the Ninth Circuit take judicial notice of these handbook changes and a revised Certificate of Authorization issued to Petitioners in light of the changes, but the court refused to do so. *See* App. 13a, n.3. Nonetheless, this Court can properly take judicial notice of these documents, which are a matter of public record and not subject to reasonable dispute. *See* Fed. R. Evid. 201. Petitioners' Certificate of Authorization and the relevant excerpts from the revised FAA Handbook are included in the appendix. *See* App. 59a-64a (Certificate of Authorization) & App. 68a-76a (FAA Handbook excerpts). In the alternative, this Court should reverse, vacate and remand this case with directions to the court below to consider the documents. There is no additional fact finding necessary, and the parties have fully argued the impact of these documents on the federal preemption issue—these documents were included in the appellate record and both sides addressed them in their briefs.

2. FAA Letter.

In July 2003, the Deputy Chief Counsel for the FAA sent a letter in response to an inquiry from U.S. Senator Daniel K. Inouye (D-Hawaii) regarding the effect of the FAA Notice. App. 77a-80a (FAA letter). Senator Inouye expressed a concern that the FAA Notice preempted the Honolulu Ordinance. The Deputy Chief Counsel for the FAA stated that the FAA did not interpret the changes announced in the FAA Notice to preempt the Honolulu Ordinance. However, the FAA counsel cautioned, "We would have a concern if a State or local government singled out aerial advertising for prohibition while permitting similar ground-based advertising since this could be interpreted as an attempt to control the navigable airspace." App. 78a. Most importantly, however, the FAA counsel unequivocally stated that "State or local regulations that have the effect of totally banning or unreasonably restricting banner towing would also be preempted since such regulations have the practical effect of barring aircraft operations that have been authorized under Individual Certificates of Waiver or Authorization issued by the FAA." App. 79a (emphasis added). Because the Honolulu Ordinance totally bans banner-towing operations, it has the effect of barring aircraft operations that have been authorized under individual Certificates of Waiver or Authorization issued by the FAA, such as Petitioners' FAA Certificate of Authorization. *See* App. 59a. Thus, according to the FAA, Respondents' total ban on banner towing is federally preempted.[8]

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[8] The Ninth Circuit observed that "[t]he FAA's position on banner towing is difficult to divine. It is fair to say that its view covers the waterfront, or in this case, the airspace." App. 12a, n.2. The court stated that, in its view, the FAA has taken inconsistent

3. FAA Handbook Changes.

On December 17, 2004, prior to the filing of appellate briefs in this case, the FAA issued permanent changes to the FAA Handbook, implicitly incorporating much of the FAA Notice.[9] These changes were brought to the Ninth Circuit's attention via Petitioners' request for judicial notice. The Ninth Circuit provisionally granted Petitioners' request to include the changes in the appellate record, and the parties argued the import of these changes in their briefs.

Significantly, in the revised FAA Handbook:

- The FAA expressly affirmed the plenary scope of its authority to regulate tow-banner operations throughout the United States and its territories by providing that if a tow-banner operator has a national operation, as Petitioners do, the FAA will issue an authorization for the "Contiguous United States." If the operator wishes to include those

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positions on whether local ordinances regulating tow-banner operations are federally preempted, noting that the July 2003 FAA letter "contains internally conflicting language." App. 12a, n.2. Leaving aside the transparent attempt by the FAA to appease a certain influential politician, it is evident that the FAA is consistent on this point: local regulations that have the effect of totally banning tow-banner operations that have been approved by the FAA under individual Certificates of Authorization are federally preempted. Should there be any question about this consistent application of FAA policy, this Court should invite the FAA to participate in this case to resolve this important issue.

[9] The revised FAA Handbook can be found in its entirety at http://www.faa.gov/library/manuals/examiners_inspectors/8700/.

states or territories outside of the contiguous United States, for example, Alaska, Hawaii, or Puerto Rico, the FAA would simply add them to the authorization, as they have done for Petitioners. App. 71a; *see also* App. 59a (Certificate of Authorization).

- The FAA expressly stated that its officials "must *not* insert into the 'Special Provisions' section of [the FAA Certificate of Authorization] any language relating to the application of State or local law (including regulations, ordinances, etc.) to banner tow operations authorized by the certificate, including the legal responsibilities of banner tow operators to comply with State or local regulations prohibiting or restricting banner tow operations." App. 74a; *see also* App. 65a-67a (FAA Notice).

- The FAA explained, unequivocally, that the "Note" provision concerning the waiver of State law or local regulations appearing on the first page of the certificates is merely "boilerplate" and "has no legal effect and should be disregarded by inspectors. This is a disclaimer of responsibility by the FAA for the enforcement of State or local ordinances." App. 74a.

- The FAA acknowledged that it permits a wide variety of expressive activity via aerial tow banners, stating, "The FAA does not regulate the content or messages displayed on banners towed by aircraft." App. 74a.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DECISION BY THE COLORADO SUPREME COURT.

In *Banner Adver., Inc. v. City of Boulder*, 868 P.2d 1077, 1078 (Colo. 1994), the Colorado Supreme Court "granted certiorari to decide whether section 10-11-3 of the Boulder City Code prohibiting commercial signs towed by aircraft is preempted by federal law, by operation of the Supremacy Clause of the United States Constitution." The court held that the ordinance was preempted and therefore unenforceable. *Id.* at 1079.

In *Banner*, two separate violations of the ordinance were at issue. The first involved a Banner pilot flying above the University of Colorado football stadium in Boulder towing a sign advertising a restaurant that sold fish. *Id.* The second violation involved a Banner pilot towing a sign advertising a sale at a hardware store. *Id.* When these two violations occurred, Banner was operating under a "Certificate of Waiver or Authorization" it received from the FAA, which expressly authorized Banner to conduct "[b]anner [t]owing for the purpose of advertising." *Id.* The certificate also contained the following "Note" under the "Standard Provisions" section: "This certificate constitutes a waiver of those Federal rules or regulations specifically referred to above. It does not constitute a waiver of any State law or local ordinance." *Id.* at 1082. Despite this "Note," the court held that federal law preempted the ordinance.

In the present case, Petitioners' Certificate of Authorization contains a similar "Note" provision, which the

Ninth Circuit considered to be determinative of the outcome, claiming that this provision demonstrates that "federal law contemplates coexistence between federal and local regulatory schemes." App. 11a-13a (internal quotations and citation omitted). Therefore, according to the Ninth Circuit, "conflict preemption does not come into play." App. 11a-13a (internal quotations and citation omitted).

The Colorado Supreme Court and the FAA unequivocally disagree with the Ninth Circuit on this important point. With regard to the effect of this "Note" provision, the Colorado Supreme Court rejected the Ninth Circuit's argument—an argument that was similarly advanced by the City in *Banner*. The Colorado Supreme Court held that the "Note" provision did not alter the preemption analysis, explaining as follows:

> First, the federal government in this situation has no power to exempt an individual from a proper state or local law. By restricting its direct effect to federal laws, the certificate only states a fundamental principle of the doctrine of federalism. . . . Second, preemption is paramount. Once preempted by federal law, a local ordinance does not regain its force in spite of the overriding effect of a federal law or regulation. The statement in the certificate does not and cannot provide the City with additional powers that it did not already possess prior to the issuance of the waiver.

Id. at 1082-83.

The Colorado Supreme Court also noted that the FAA's chief counsel concluded that "the certificate's language stating that it does not waive state or local law refers only to those activities that a state or local government could ordinarily regulate, such as license fees or taxes." *Id.* at 1083.

More recently, in the latest version of its handbook the FAA explains that this "Note" provision is merely "boilerplate" and "has no legal effect and should be disregarded by inspectors. This is a disclaimer of responsibility by the FAA for the enforcement of State or local ordinances." App. 74a.

Thus, not only did the Ninth Circuit reject the Colorado Supreme Court's argument, it remarkably rejected the FAA's position on the effect of a provision contained in its own document. Moreover, this "Note" says nothing about subjecting the certificate or its holder to any State or local laws that prohibit tow banner operations for purposes of aerial advertising. Indeed, such a provision would be a non sequitur because the FAA Certificate of Authorization issued to Petitioners explicitly states that it authorizes "aerial advertisement banner towing." App. 59a.

In its decision, the Colorado Supreme Court also noted that the chief counsel for the FAA wrote a letter in which he concluded that the Boulder ordinance was an impermissible attempt to regulate banner towing and was therefore preempted by federal law. *Id.* at 1083.

Finally, the Colorado Supreme Court observed that "the Boulder ordinance regulates aircraft in flight and prohibits commercial banner towing by aircraft," whereas "[t]he FAA regulation allows banner towing if the pilot first obtains an FAA certificate of waiver." *Id.* at 1084. As a result, the court concluded that "[t]he Boulder ordinance is more stringent than the federal regulation" and thus "stands as an obstacle to the accomplishment and execution of the federal regulation and is therefore preempted." *Id.* at 1084-85 (citing *Hines v. Davidowitz*, 312 U.S. 52 (1941) (holding that state regulations imposing additional requirements on registered

aliens were preempted by federal law in the same area) and *Ray v. Atlantic Richfield, Co.*, 435 U.S. 151 (1978) (holding that state safety standards for sea tanker vessels that were more stringent than federal standards were preempted by the federal regulations in that area)).

In the present case, the Honolulu Ordinance "regulates aircraft in flight and prohibits . . . banner towing by aircraft," whereas the FAA expressly permits Petitioners to engage in banner towing. *See Banner Adver., Inc.*, 868 P.2d at 1084. As a result, federal law displaces the Honolulu Ordinance because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law. *See Hines*, 312 U.S. at 67.

Thus, the conflict is clear. The FAA says that tow-banner operations, such as those conducted by Petitioners, are permissible in the navigable airspace over Hawaii and have promulgated regulations and issued a certificate authorizing such operations. Respondents say that such operations are not permissible. Under the Supremacy Clause, the FAA, and therefore Petitioners, win this dispute.

In the final analysis, the Colorado Supreme Court answered the preemption question correctly, whereas the Ninth Circuit did not. This Court should grant review to resolve this decisional conflict on an important question of federal law that has national implications.

II. THE HONOLULU ORDINANCE VIOLATES THE FIRST AMENDMENT.

A. THE NAVIGABLE AIRSPACE IS A FEDERALLY DESIGNATED PUBLIC FORM.

This Court has adopted a forum analysis as a means of determining when the government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for expressive purposes. *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985). Applying this analysis to the navigable airspace compels the conclusion that this airspace is a federally designated forum for certain forms of speech, such as Petitioners' political speech.

As this Court stated, "[W]hen the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest." *Id.* "A public forum may be created by government designation of a place or *channel of communication* for use by the public at large for assembly and speech, *for use by certain speakers*, or for the discussion of certain subjects." *Id.* at 802 (emphasis added).

At a minimum, the navigable airspace is a "designated" public forum because the FAA issues permits in the form of Certificates of Authorization that allow certain speakers, including Petitioners, to use the navigable airspace to communicate their message. *See Banner Adver., Inc.*, 868 P.2d at 1077; *see also* App. 59a-64a (Certificate of Authorization). In fact, the FAA permits speakers to use the airspace for speech ranging from commercial advertisements, *see id.* at 1079 (towing a banner advertising a restaurant that sells fish), to political speech. The FAA imposes no

restrictions on the messages that are conveyed by aerial banners, and it permits a wide variety of commercial and political speech. *See Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1232 (7th Cir. 1985) (finding public forum where the government permitted advertising on "a wide variety of commercial, public-service, public-issue, and political ads"); *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 130 (2d Cir. 1998) (finding public forum where the government permitted "political and other non-commercial advertising generally"). And there is no dispute that the federal government has plenary control over the navigable airspace. *See Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) ("Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands."); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973) (holding that "pervasive nature of the scheme of federal regulation" preempted city's ordinance regulating aircraft noise); 49 U.S.C. § 40103 (stating that the federal government has exclusive sovereignty of the airspace of the United States).

The Ninth Circuit's conclusion that the navigable airspace is not a designated public forum is inconsistent with, and contrary to, the controlling law and facts. *See* App. 14a-17a. First, the FAA authorizes certain qualified speakers to engage in unlimited expressive activity via aerial tow banners. The FAA does not restrict the type of communications expressed, whether it is commercial speech advertising a restaurant or political speech expressing an anti-abortion message. App. 74a (FAA Handbook) ("The FAA does not regulate the content or messages displayed on banners towed by aircraft."). In fact, Petitioners have expressed their political

message via aerial tow banners in approximately nineteen other states pursuant to FAA authorization, and this number continues to grow.

Second, the Certificates of Authorization constitute an intentional decision on the part of the FAA to open the navigable airspace for expressive activity. The FAA issues these certificates for the specific purpose of allowing aircraft to fly aerial banners expressing various messages. Thus, it is the policy and practice of the FAA to allow this form of expression, and, as history, experience, and the facts of this case show, the navigable airspace is completely compatible with, and conducive to, this highly effective and efficient form of expression. *See Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998) (noting factors such as "the policy and practice of the government" and "the nature of the property and its compatibility with expressive activity" for determining if the government has created a designated public forum).

And finally, because only the FAA can grant Certificates of Authorization for tow-banner operations, *see* 14 C.F.R. § 91.311 (2004) ("No pilot of a civil aircraft may tow anything with that aircraft . . . except in accordance with the terms of a certificate of waiver issued by the Administrator."), the navigable airspace is a federally designated public forum in which State and local governments have no authority to close.[10]

Because the federal government has designated the navigable airspace as a place or channel of communication for

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[10] This fact also highlights why federal law preempts the Honolulu Ordinance.

use by certain speakers by issuing permits (*i.e.*, certificates) for its use regardless of the speaker's message, the airspace is a federally designated forum for expressive activity. It is evident from the facts of this case and the history of tow-banner operations that the navigable airspace is compatible with expressive activity, and the FAA concurs because it issues permits to allow such activity.

B. PETITIONERS' AERIAL BANNERS ARE PROTECTED SPEECH.

Unquestionably, Petitioners aerial banners are a form of speech protected by the First Amendment. App. 14a ("It is uncontested that the banner towing at issue is a form of speech protected under the First Amendment."); App. 39a-40a ("[Petitioners'] aerial tow banners are without doubt a form of political speech that is protected by the First Amendment."). Petitioners use aerial tow banners to publicly express their message in opposition to abortion. The tow banners are not solicitations or commercial advertisements; they are purely political speech.

In *Hill v. Colorado*, 530 U.S. 703, 714-15 (2000), this Court recognized that "leafletting, sign displays, and oral communications are protected by the First Amendment." *See also United States v. Grace*, 461 U.S. 171, 176-77 (1983) (demonstrating with signs, banners or other devices constitutes protected speech under the First Amendment). And "[t]he fact that the messages conveyed by [sign displays, including "fetus signs,"] may be offensive to their recipients does not deprive them of constitutional protection." *Hill*, 530 U.S. at 715 & 710, n.7.

In fact, Petitioners' political speech "rest[s] on the highest rung of the hierarchy of First Amendment values." *NAACP*

v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (citations omitted); *see also National Adver. Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988) ("The first amendment affords greater protection to noncommercial than to commercial expression."). And speech, such as Petitioners', "best serve[s] its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949).

Aesthetics, tourism, and a desire for tranquility are not acceptable reasons for restricting Petitioners' political speech. *See, e.g., Schneider v. New Jersey*, 308 U.S. 147, 162 (1939) (holding that aesthetics was not a compelling interest to prevent the expression of one's views through the distribution of leaflets). Honolulu is not a "First Amendment-free zone" simply because it is a tourist attraction. Moreover, the exemptions from the Honolulu Ordinance (*e.g.*, permitting aerial advertising by the Goodyear blimp) greatly diminish the credibility of Respondents' rationale for banning the speech in the first instance. *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place.").

Because a regulation of speech in a public forum is subject to heightened scrutiny, the Honolulu Ordinance is permissible only if it is narrowly drawn to achieve a compelling state interest. *See Cornelius*, 473 U.S. at 800 ("[W]hen the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest."). The Honolulu

Ordinance does not pass this highest or any other level of scrutiny under the First Amendment.

C. THE HONOLULU ORDINANCE IS AN UNREASONABLE, CONTENT-BASED RESTRICTION ON POLITICAL SPEECH.

The Honolulu Ordinance is a total ban on a particular medium for political speech. Respondents have made no effort to create any reasonable time, place, or manner regulations; instead, they completely ban aerial political speech, while permitting certain commercial aerial speech. A complete ban on a particular medium of speech for political expression is not reasonable and violates the First Amendment.

In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), this Court invalidated a San Diego ordinance that placed significant prohibitions on outdoor advertising displays. The city justified its ordinance on the basis of safety and aesthetics. This Court struck down the city ordinance in its entirety based on two distinct lines of reasoning. First, Justice White's plurality opinion reasoned that the ordinance was unconstitutional because it discriminated on the basis of content by permitting on-site commercial speech while broadly prohibiting noncommercial messages. *Id.* at 514-15. On the other hand, Justice Brennan, joined by Justice Blackmun, concluded that "the practical effect of the San Diego ordinance [was] to eliminate the billboard as an effective medium of communication" for noncommercial speech, and that the city had failed to make the strong showing necessary to justify such "content-neutral prohibitions of particular media of communication." *Id.* at 525-27.

Both of the concerns raised by this Court in *Metromedia, Inc.* are present here and compel a conclusion that the Honolulu Ordinance is unconstitutional.

1. The Honolulu Ordinance Is a Content-Based Regulation in Violation of the First Amendment.

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

To be lawful, speech regulations must be content-neutral. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980) ("[A] constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech."). Speech regulations that draw distinctions between commercial and noncommercial speech are content-based. *See Metromedia, Inc.*, 453 U.S. at 490 (holding unconstitutional a city ordinance prohibiting outdoor advertising because it discriminated on the basis of content by permitting on-site commercial speech while broadly prohibiting noncommercial messages) (White, J., plurality opinion); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418 (1993) (invalidating an ordinance that permitted news racks on public streets for newspapers, but not news racks for commercial handbills); *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998) ("By distinguishing between commercial and noncommercial forms of expression, the [ordinance] is content-based.").

In *Metromedia, Inc.*, a plurality of this Court found it permissible to distinguish between on-site and off-site *commercial* signs; however, it declared the city's ordinance unconstitutional because of its general ban on *noncommercial* signs. *Metromedia, Inc.*, 453 U.S. at 511-14. Here, the Honolulu Ordinance bans noncommercial aerial speech, but permits certain commercial aerial speech, which it cannot do consistent with the First Amendment.

The Honolulu Ordinance expressly permits "the display of an identifying mark, trade name, trade insignia, or trademark on the exterior of an aircraft . . . if the displayed item is under the ownership or registration of the aircraft's . . . owner." *See* App. 57a. Therefore, airlines such as Northwest and American can advertise their own companies via aerial advertising (*i.e.*, the large and visible markings and paint schemes on the sides of their aircraft), and Goodyear, Fuji Film, and MetLife can do the same with the advertisements on the sides of their blimps. However, the Honolulu Ordinance broadly prohibits Petitioners from engaging in noncommercial aerial speech in violation of the First Amendment.

2. The Honolulu Ordinance Is a Total Ban on an Entire Medium of Expression in Violation of the First Amendment.

The fact that the Honolulu Ordinance is a total ban on a particular medium of expression is sufficient to invalidate this ordinance. In a series of cases this Court has voiced particular concern with laws that foreclose an entire medium of expression. *See City of Ladue*, 512 U.S. at 43 (invalidating a ban on the display of signs on private property); *Lovell v. City of Griffin*, 303 U.S. 444, 451-452 (1938) (invalidating a ban on the distribution of pamphlets);

Jamison v. Texas, 318 U.S. 413, 416 (1943) (invalidating a ban on the use of handbills on public streets); *Martin v. City of Struthers*, 319 U.S. 141, 145-149 (1943) (invalidating a ban on the door-to-door distribution of literature); *Schad v. Mount Ephraim*, 452 U.S. 61, 75-76 (1981) (invalidating a ban on live entertainment).

Moreover, even content-neutral regulations "that do not foreclose an entire medium of expression, but merely shift the time, place, or manner of its use, must 'leave open ample alternative channels for communication.'" *City of Ladue*, 512 U.S. at 56 (internal quotations and citation omitted); *see also Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (noting that "a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate") (citations omitted). The Honolulu Ordinance not only forecloses an entire medium of expression, but its prohibition on this unique and important medium of communication does not leave open ample channels of communication for Petitioners' political message.

By deploying one aerial banner for approximately five hours, Petitioners estimate that they are able to communicate their political message to many hundreds of thousands of people. Any other medium for expressing Petitioners' political message would be manpower and cost prohibitive, create significant safety risks, and most importantly, it would be ineffective.

Petitioners' speech *is* the visual impact that the large photographs on their aerial banners have on viewers, and

these banners are uniquely significant and effective.[11] Petitioners' large photographs present a powerful message and communicate ideas that are rhetorically inexpressible. Moreover, Petitioners' aerial banners, unlike traditional billboards, are able to move up and down the beaches of Honolulu and over other public areas, reaching a significantly larger and more diverse audience in a relatively short amount of time. In fact, aerial banners are the only mode of communication that permits Petitioners to express their political message to their intended audience—the significant numbers of people who visit the beaches of Honolulu. Petitioners would have to forfeit the visual impact of their large aerial banners, subject themselves to considerable safety risks, and commission the assistance of an army of volunteers in order to use handbills or leaflets to reach their intended audience with a watered-down version of their message. Standing on street corners handing out brochures, going door-to-door with leaflets, or marching on sidewalks with small placards communicates a message to so few people in Honolulu that any hope Petitioners have of influencing public opinion at levels that create a new political consensus regarding abortion is illusory. And as the record shows, such low-impact methods (*i.e.*, micro media) pose significant safety risks for Petitioners and those who assist them due to the controversial nature of their message.

In addition, Respondents prohibit by municipal ordinance "[a]ny sign which advertises or publicizes an activity not conducted on the premises on which the sign is maintained" and "[a]ny . . . portable sign." *See* Rev. Ordinance of Honolulu § 21-7.30 (b), (c). This ordinance not only

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[11] Petitioners' aerial banners are 35 x 100 feet and 46 x 100 feet in size.

prohibits the display of traditional billboards, but it also prohibits other sign displays, and it and other similar ordinances ban the display of Petitioners' pictures in other contexts.[12]

By proscribing Petitioners' aerial banners, Respondents are silencing Petitioners' speech and denying Petitioners a uniquely valuable and important mode of communication that is without an effective substitute. Indeed, the First Amendment is not simply about the right to catharsis—it is about the right to meaningfully participate in public debate on important issues, such as abortion. Respondents seek to create an "island paradise" exempt from the proscriptions of the First Amendment by relegating Petitioners to inefficient, costly, unsafe, and most importantly, ineffective ways to express their political message. The large and graphic photographs displayed on Petitioners' aerial banners are Petitioners' message. It is a specious argument to claim that there are ample alternatives in Honolulu for these large photographs. These large images convey a powerful message, and the tow-banner aircraft is the only effective and available way for Petitioners to convey this political message to the large numbers of people who visit the beaches in Honolulu.

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[12] *See, e.g.*, Rev. Ordinance of Honolulu § 21-7.20 (defining "Portable signs" to mean "signs which have no permanent attachment to a building or the ground" and setting a standard size of not greater than "16 square feet in sign area"); Rev. Ordinance or Honolulu § 29-14.1 et seq., *Unlawful Signs Within Street Rights-of-way and Public Malls* (stating that "[n]o person shall erect, establish, construct, maintain, keep or operate a sign, including but not limited to a portable sign, on, above or below: (1) Any street right-of-way, including any sidewalk area or medial strip").

In the final analysis, Defendants have "completely foreclosed a venerable means of communication that is both unique and important," *see City of Ladue*, 512 U.S. at 54, in violation of the First Amendment.

CONCLUSION

Because the Ninth Circuit has decided an important federal question in a way that conflicts with a decision by the Colorado Supreme Court consideration by this Court is warranted. Additionally, this case presents an important federal question of first impression: whether the navigable airspace is a federally designated public forum for aerial political speech such that the Honolulu Ordinance, which is a total ban on this form of expression, violates the First Amendment.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-17496

[Amended July 6, 2006]

CENTER FOR BIO-ETHICAL REFORM, INC.; GREGG CUNNINGHAM,
Plaintiffs-Appellants,

v.

CITY AND COUNTY OF HONOLULU; PETER CARLISLE, in his official capacity as the City and County of Honolulu Prosecuting Attorney; BOISSE P. CORREA, in his official capacity as Chief of Police, Honolulu Police Department, successor to Lee D. Donohue,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding
D.C. No. CV-03-00154-DAE

Before: Myron H. Bright,* M. Margaret McKeown, and Richard R. Clifton, Circuit Judges.

ORDER

The Opinion filed on May 23, 2006, is amended as follows:

On slip Opinion page 5645, line 10 of footnote 1, insert the following text before the sentence that begins with "We note that Hawaii Revised Statute . . .": Neither did the district court abuse its discretion in denying the Center's request to amend its complaint. *See Flowers v. First Hawaiian Bank*, 295 F.3d 966, 976 (9th Cir. 2002) ("We review for abuse of discretion the denial of leave to amend after a responsive pleading has been filed.").

On slip Opinion page 5646, line 32, beginning with the sentence "In *Skysign* we explained . . ." and ending on page 5647, line 4, with "*Id.* at 1115.", delete and replace with the following text: In *Skysign*, we explained that "advertising is an area traditionally subject to regulation under the states' police power, and we therefore presume that federal law does not displace Honolulu's regulatory authority over advertising absent a clear statement of the federal intent to do so, either by Congress or by the FAA as Congress's delegate. . . . However, no such presumption applies to section 40-6.1, the *aerial*

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* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

signage ordinance, which rather than addressing advertising generally specifically targets for regulation 'an area where there has been a history of significant federal presence,' *i.e.*, navigable airspace." *Id.* at 1115-16 (citations omitted).

On slip Opinion page 5649, at the end of footnote 3, insert the following text: Consideration of these documents and after-enacted changes is best left to the district court, not to the court of appeals for initial analysis. There is good reason why we generally do not consider issues for the first time on appeal--the record has not been developed, the district court has not had an opportunity to consider the issue, and the parties' arguments are not developed against the district court decision.

With these amendments, the panel has voted to deny the petition for panel rehearing. Judges McKeown and Clifton vote to deny the petition for rehearing en banc and Judge Bright so recommends. The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-17496

[Amended July 6, 2006]
[Filed May 23, 2006]

CENTER FOR BIO-ETHICAL REFORM, INC.; GREGG CUNNINGHAM,
Plaintiffs-Appellants,

v.

CITY AND COUNTY OF HONOLULU; PETER CARLISLE, in his official capacity as the City and County of Honolulu Prosecuting Attorney; BOISSE P. CORREA, in his official capacity as Chief of Police, Honolulu Police Department, successor to Lee D. Donohue,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding
D.C. No. CV-03-001540-DAE

McKEOWN, Circuit Judge.

AMENDED OPINION

The City and County of Honolulu, Hawaii ("Honolulu"), has a long history of comprehensive regulatory oversight over its visual landscape, an effort designed to protect the area's unique and widely-renowned scenic resources. For example, in 1957, Honolulu was among the first municipalities to enact a comprehensive ordinance regulating signs, *see State v. Diamond Motors, Inc.*, 429 P.2d 825, 826 (1967), and, in 1978, Honolulu first passed what later became Revised Ordinance of Honolulu § 40-6.1 (1996) ("the Ordinance"), which prohibits aerial advertising.

The question presented in this appeal is whether the Ordinance may be used to restrict an advocacy group from towing aerial banners over the beaches of Honolulu. To answer this question, we must first decide whether the Ordinance is preempted by federal law, and, if not, whether it passes constitutional scrutiny under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Less than five years ago, we answered the preemption question in the negative. *Skysign Int'l, Inc. v. City and County of Honolulu*, 276 F.3d 1109 (9th Cir. 2002). Nothing presented in this appeal persuades us that we should depart from that precedent. As to the constitutional question, we hold that the Ordinance passes constitutional muster. The Ordinance is a reasonable and viewpoint neutral restriction on speech in a nonpublic forum, and the banner towing prohibited by the Ordinance is neither a historically important form of communication nor speech that has unique identifying attributes for which there is no practical substitute. We affirm the district court's grant of summary judgment in favor of Honolulu.

BACKGROUND

Honolulu's aerial advertising Ordinance is part of a long-standing scheme aimed at regulating outdoor advertising in order to protect the critical visual landscape that has made the area famous. The linkage between the scenic viewscapes and the economic well-being of Honolulu, including its tourist industry, is not disputed. As one witness–aptly stated, "looking out to sea from Waikiki Beach without commercial or promotional interruption is as crucial to the Hawaii visitor's and resident's experience as is the uninterrupted viewing of the canyon for travelers to the Grand Canyon....[F]ew things can damage the distinctive character of a scenic view faster than a large moving sign pulled through the center of the field of vision."

Given the importance of preserving the area's coastal and scenic visual beauty, and in an effort to prevent potentially dangerous aerial distractions for its coastal vehicle traffic, Honolulu enacted the Ordinance, which, with few exceptions, prohibits aerial advertising:

> (a) Except as allowed under subsection (b), no person shall use any type of aircraft or other self-propelled or buoyant airborne object to display in any manner or for any purpose whatsoever any sign or advertising device. For the purpose of this section, a "sign or advertising device" includes, but is not limited to, a poster, banner, writing, picture, painting, light, model, display, emblem, notice, illustration, insignia, symbol or any other form of advertising sign or device.
>
> (b) Exceptions.

(1) Subsection (a) shall not prohibit the display of an identifying mark, trade name, trade insignia, or trademark on the exterior of an aircraft or self-propelled or buoyant airborne object if the displayed item is under the ownership or registration of the aircraft's or airborne object's owner.

(2) Subsection (a) shall not prohibit the display of a sign or advertising device placed wholly and visible only within the interior of an aircraft or self-propelled or buoyant airborne object.

(3) Subsection (a) shall not apply to the display of a sign or advertising device when placed on or attached to any ground, building, or structure and subject to regulation under Chapter 21 or 41. Such a sign or advertising device shall be permitted, prohibited, or otherwise regulated as provided under the applicable chapter.

Section 40-6.1.

The Center for Bio-Ethical Reform and its director Gregg Cunningham (collectively "the Center") challenge the Ordinance because it prevents the Center from carrying out its aerial advocacy campaign over Honolulu's beaches. The Center is a pro-life/anti-abortion advocacy group that hires airplanes to tow aerial banners over heavily populated areas. These banners are typically 100-feet-long and display graphic photographs of aborted fetuses. The Center has used this publicity technique in many states and has found it to be very effective in spreading its message.

Absent specific authorization, Federal Aviation Administration ("FAA") regulations prohibit operation of

civilian aircraft over densely populated areas. 14 C.F.R. § 91.313(e). Consequently, prior to towing its banners, the Center obtained permission from the FAA in the form of a Certificate of Authorization ("Certificate"). The Certificate states that it authorizes "aerial advertisement banner towing," but contains a note stating that it "does not constitute a waiver of any State law or local ordinance." The Certificate grants authorization to tow banners in "the contiguous United States of America, Alaska, Hawaii, and Puerto Rico."

Upset that under the Ordinance it could not tow banners over Honolulu, the Center filed suit seeking declaratory and injunctive relief to prevent enforcement of the Ordinance. The Center alleged that the Ordinance violates its right to free speech under the First Amendment and its right to Equal Protection under the Fourteenth Amendment and that federal law preempts the Ordinance. The district court denied the Center's motion for preliminary injunction and we affirmed that ruling. *Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu*, 84 Fed.Appx. 779 (9th Cir. 2003).

The Center and Honolulu then filed cross-motions for summary judgment and the district court granted summary judgment in favor of Honolulu. *Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu*, 345 F. Supp. 2d 1123 (D. Haw. 2004).[1] The district court rejected the

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[1] The Center also claimed that Honolulu did not have jurisdiction to enforce the Ordinance above coastal waters outside the territorial boundaries of Honolulu. Because the Center's original complaint did not include any reference to this claim, the district court declined to address it. *Center for Bio-Ethical Reform*, 345 F. Supp. 2d at 1138-39. We likewise do not consider the merits of this claim because it does not fall within the "narrow and discretionary exceptions to the general rule against considering issues for the first

preemption argument and held that the Ordinance did not violate the Center's constitutional rights.

ANALYSIS

I. THE ORDINANCE IS NOT PREEMPTED BY FEDERAL LAW

Within certain Constitutional limits and absent explicit language preempting state law, Congress may implicitly preempt state law through a comprehensive regulatory scheme that occupies the entire field being regulated, leaving no room for state or local supplementation:

> Absent explicit preemptive language, Congress' intent to supercede state law altogether may be found from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the

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time on appeal." *Alaska v. United States*, 201 F.3d 1154, 1163 (9th Cir. 2000) (quoting *Jovanovich v. United States*, 813 F.2d 1035, 1037 (9th Cir. 1987)). Neither did the district court abuse its discretion in denying the Center's request to amend its complaint. *See Flowers v. First Hawaiian Bank*, 295 F.3d 966, 976 (9th Cir. 2002) ("We review for abuse of discretion the denial of leave to amend after a responsive pleading has been filed."). We note that Hawaii Revised Statute § 445-113 (2005) was recently amended to allow a county to regulate "outdoor advertising devices located in the airspace or waters beyond the boundaries of the county that are visible from any public highway, park, or other public place located within the county."

> same subject, or because the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.

Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n, 461 U.S. 190, 203-04 (1983) (quotation marks omitted); *see also Barber v. Hawaii,* 42 F.3d 1185, 1189 (9th Cir. 1994). This form of preemption is known as field preemption. Federal law may also preempt state law where state law is displaced in favor of an actual conflict with federal law. This form of preemption is known as conflict preemption:

> Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Pac. Gas & Elec., 461 U.S. at 204 (quotation marks and citations omitted); *see also Barber,* 42 F.3d at 1189.

The Center argues that Congress, via the FAA, occupies the entire field of tow banner regulation, and further, that the FAA Certificate impermissibly conflicts with the Ordinance. The Ninth Circuit has already spoken on this issue, upholding the Ordinance against a virtually identical federal preemption challenge. *Skysign,* 276 F.3d 1109. In *Skysign,* we explained that "advertising is an area traditionally subject to regulation under the states' police power, and we therefore presume that federal law does not displace Honolulu's regulatory authority

over advertising absent a clear statement of the federal intent to do so, either by Congress or by the FAA as Congress's delegate.... However, no such presumption applies to section 40-6.1, the *aerial* signage ordinance, which rather than addressing advertising generally specifically targets for regulation 'an area where there has been a history of significant federal presence,' *i.e.*, navigable airspace." *Id.* at 1115-16 (citations omitted). Neither Congress nor the FAA has "exerted its statutory authority to a degree that warrants a holding that it has preempted the entire field." *Id.* at 1116. Although Congress has "left open the door for the FAA to do so through the use of its authority to develop regulations for the use of navigable airspace .... without some affirmative accompanying indication, [the FAA regulatory scheme does not] compel a conclusion that the agency has sought to occupy the field to the full." *Id.*

We also analyzed whether a FAA "certificate of waiver," which is similar to the Certificate in this appeal, precludes the enforcement of the Ordinance under principles of conflict preemption. *Id.* at 1117. If the federal law "contemplates coexistence between federal and local regulatory schemes," conflict preemption does not come into play. *Id.* The certificate of waiver in *Skysign* contemplated such a coexistence, as evidenced by a specific provision that provided: "[t]he [aircraft] operator, by exercising the privilege of this waiver, understands all local laws and ordinances relating to aerial signs, and accepts responsibility for all actions and consequences associated with such operations." *Id.* at 1117-18. The FAA Handbook, which is the same one analyzed in *Skysign* and in this appeal, suggests including "similar provisions in waivers for banner tow operations ... that the certificate and its special provisions 'do not supersede any local, state, or city ordinance(s) prohibiting aerial advertising.'" *Id.* at 1118. The Center's Certificate

contains precisely such a provision, stating that the Certificate "does not constitute a waiver of any State law or local ordinance."

In the face of compelling precedent to the contrary, the Center urges that *Skysign* is no longer controlling because after the case was decided, the FAA issued a notice on October 7, 2002, that proposed deletion of certain provisions of the FAA Handbook. FAA Notice N 8700.16. We give the notice no weight because it self-expired on October 7, 2003, without any change to the FAA Handbook. *See U.S. West, Inc. v. United States*, 48 F.3d 1092, 1101 (9th Cir. 1994) (stating that "'failed legislative proposals' and [accompanying] recommendations in committee reports .... [are not] sufficient evidence to suggest that there is any relevant congressional intent to which this court could defer."), *judgment vacated on other grounds*, 516 U.S. 1155 (1996). Thus, the substance of the proposed change in the FAA Handbook merits no review on our part. For the same reason, we have no occasion to analyze a letter from the FAA's Deputy Chief Counsel explaining the proposed changes.[2]

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[2] The FAA's position on banner towing is difficult to divine. It is fair to say that its view covers the waterfront, or in this case, the airspace. In an amicus brief filed in *Skysign*, the agency took the position that federal law did not preempt local sign ordinances. *See Skysign*, 276 F.3d at 1117. In other opinion letters, the FAA took the opposite view. *See id.* at 1117 & 1118 n. 6 (discussing various letters from FAA counsel and *Banner Adver., Inc. v. City of Boulder*, 868 P.2d 1077 (Colo. 1994)). And, to confuse matters further, the FAA letter offered in connection with the October 7, 2002 notice contains internally conflicting language.

Because the FAA Handbook and regulations before us remain the same as they were in *Skysign* and the Center's Certificate contemplates the coexistence of local and federal law, we are bound by *Skysign's* no preemption conclusion. *Skysign,* 276 F.3d at 1118 ("[W]e conclude that the application of Honolulu's ordinances does not impede the federal policy or purpose in issuing [the] Certificates of Waiver."). We recognize though, as we did in *Skysign,* that Congress itself, or through the FAA, may have the authority to completely occupy the field of banner towing or regulate it in such a way that could preempt the Ordinance. *See id.* at 1116. We need not decide that issue here, however, because in the present appeal, no such affirmative regulations justify federal preemption.[3] We now turn to the Center's claim that the Ordinance violates the First Amendment.

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[3] The Center requests that we take judicial notice of changes made to the FAA Handbook on December 17, 2004, and a revised Certificate issued to the Center on February 22, 2005, both of which went into effect after the district court's decision in November 2004. We deny the Center's request for judicial notice pursuant Federal Rule of Evidence 201 because these documents were not before the district court and their significance, if any, is not factored into the record on appeal. Consideration of these documents and after-enacted changes is best left to the district court, not to the court of appeals for initial analysis. There is good reason why we generally do not consider issues for the first time on appeal–the record has not been developed, the district court has not had an opportunity to consider the issue, and the parties' arguments are not developed against the district court decision.

II. THE ORDINANCE DOES NOT VIOLATE THE FIRST AMENDMENT

It is uncontested that the banner towing at issue is a form of speech protected under the First Amendment. The Center has a targeted message that it wishes to communicate. "But it is also well settled that the government need not permit all forms of speech on property that it owns and controls." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). To assess a First Amendment free speech claim, "we first must 'identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic.'" *Preminger v. Principi*, 422 F.3d 815, 823 (9th Cir. 2005) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985)).

A. THE AIRSPACE IS A NONPUBLIC FORUM

For purposes of First Amendment analysis, public property fits into one of three main categories: (1) a public forum, (2) a designated public forum, or (3) a nonpublic forum. *Preminger*, 422 F.3d at 823. Any public property that is neither a public nor a designated public forum is considered a nonpublic forum. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999).

Public fora are places "that have traditionally been devoted to expressive activity," such as public parks and sidewalks. *Preminger*, 422 F.3d at 823. "Content-based restrictions in public fora are justified only if they serve a compelling state interest that is narrowly tailored to the desired end." *Id.* This level of review is known as strict scrutiny. Designated public fora are nonpublic fora that the government affirmatively opens to expressive activity. *Id.* As

with public fora, content-based restrictions on designated public fora must pass strict scrutiny. *Id.*

Areas not traditionally or explicitly opened to expressive activity are deemed nonpublic fora, which are subject to a more lenient standard of scrutiny–restrictions on nonpublic fora need only be reasonable and viewpoint neutral. *Id.* Examples of nonpublic fora include airport terminals, *Lee,* 505 U.S. at 679, highway overpass fences, *Brown v. Cal. Dep. of Transp.,* 321 F.3d 1217, 1222 (9th Cir. 2003), and interstate rest stop areas (including perimeter walkways), *see Jacobsen v. Bonine,* 123 F.3d 1272, 1273- 74 (9th Cir. 1997).

A review of the history, purpose, and physical characteristics of the airspace at issue leads us to conclude that it is a nonpublic forum. As to its history and purpose, the airspace does not fit the public forum category because it is not among those places that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Lee,* 505 U.S. at 679. "[A] traditional public forum is property that has as 'a principal purpose ... the free exchange of ideas.' *Id.* (alteration in original) (quoting *Cornelius,* 473 U.S. at 800).

Like the airport terminal in *Lee,* the highway overpass fences in *Brown,* and the interstate rest stops in *Jacobsen,* the use of the airspace for banner towing is a relatively modern creation that "hardly qualifies for the description of having 'immemorially ... time out of mind' been held in the public trust and used for purposes of expressive activity." *Lee,* 505 U.S. at 680. In fact, one would be hard pressed to find another forum that has had its access as historically restricted as U.S. airspace. The FAA has strict regulations governing

the airspace and for more than twenty-five years Honolulu has regulated aerial advertising. In light of the numerous restrictions placed on the use of the airspace in and around Honolulu, its principal purpose can hardly be characterized as "promoting 'the free exchange of ideas.'" *Id.* at 682; *see United States v. Kokinda,* 497 U.S. 720, 727 (1990) (contrasting a public street, which is "a necessary conduit in the daily affairs of a locality's citizens" with a "postal sidewalk ... constructed solely to provide for the passage of individuals engaged in postal business").

The physical characteristics of the airspace also underscore that it is not a public forum. The airspace is not, as the Center argues, an extension of the fora below, namely the beaches. We do not express any opinion as to whether the beaches are public fora because the record is not developed on this point and this categorization is not necessary to our analysis. But even assuming that the beaches are public fora, the airspace above is not a public forum by extension.

Spatial proximity to a public forum is determinative only if the two areas are physically "indistinguishable." *See, e.g., United States v. Grace,* 461 U.S. 171, 179 (1983) (sidewalks leading to the United States Supreme Court building indistinguishable in both location and purpose from other public sidewalks and thus public fora). In *Kokinda,* the Supreme Court explained *Grace* as requiring the location and purpose of the property to be examined before it is deemed a public forum by proximity or extension. 497 U.S. at 728-29. Examining the location and purpose of the airspace surrounding the beaches of Honolulu, the airspace is easily distinguishable from the fora below. The airspace is physically separate from the ground or beaches, requires special equipment and authorization for access, and has never typically been a locus of expressive activity.

Nor can the airspace be classified as a designated public forum, which is created only when the government has "expressly dedicated the property for expressive conduct." *Preminger,* 422 F.3d at 824 (citing *Widmar v. Vincent,* 454 U.S. 263, 267 (1981)). The regulated airspace is the antithesis of an "intentional [ ] opening [of] a nontraditional forum for public discourse." *Cornelius,* 473 U.S. at 802. The Ordinance explicitly prohibits using Honolulu's airspace as a forum for expressive conduct and neither party cites a single example where expressive activity was sanctioned to occur in Honolulu's airspace. Further, Honolulu's airspace is not naturally compatible with expressive activity.

We are thus left to examine the airspace as a nonpublic forum, in which the Ordinance does not violate the First Amendment as long as it is "(1) reasonable in light of the purpose served by the forum and (2) viewpoint neutral." *Brown,* 321 F.3d at 1222 (quotation marks omitted).

B. THE ORDINANCE IS VIEWPOINT NEUTRAL

The Ordinance's prohibition against airborne signs or advertising devices is viewpoint free. "Viewpoint discrimination is a form of content discrimination in which 'the government targets not subject matter, but particular views taken by speakers on a subject.'" *Id.* at 1223 (citing *Children of the Rosary v. City of Phoenix,* 154 F.3d 972, 980 (9th Cir. 1998)). The Ordinance prohibits the "display in any manner or for any purpose whatsoever any sign or advertising device" by an "aircraft or other self-propelled or buoyant airborne object." The Ordinance says nothing about the content of the signs or the views expressed. In contrast to the laws at issue in other sign cases, the Ordinance makes no distinction between commercial signs and other displays. *See, e.g., Metromedia, Inc. v. City of San Diego,* 453 U.S. 490,

494-96 (1981). Nor does it distinguish between commercial speech or political speech. And, finally, the Ordinance draws no lines by subject matter (such as countenancing speech on behalf of candidates and yet restricting it on behalf of issue advocacy groups) or by viewpoint (such as distinguishing among views on abortion). In short, the prohibition is entirely neutral.

The only relevant exception to the absolute bar on advertising is that the Ordinance permits "an identifying mark, trade name, trade insignia, or trademark on the exterior of an aircraft .... if the displayed item is under the ownership or registration of the aircraft's or the airborne object's owner." § 40-6.1(b)(1). This exception, which pertains to the external marking of an aircraft, is a common sense one. Honolulu would be hard pressed to say that aircraft flying over the beach are prohibited from displaying their name and logo, such as Hawaiian Airlines, Aloha Airlines, Quantas Airlines, or United Airlines, when the FAA is charged with prescribing regulations for identification of aircraft. 49 U.S.C. § 40103(b)(2).

Despite the facial neutrality of the Ordinance, the Center argues that the Ordinance is not viewpoint neutral because it discriminates between commercial advertising and political speech. Under the Ordinance, the Center argues, one could fly the Goodyear Blimp carrying a commercial message, yet would be prohibited from towing banners carrying the Center's political message. This argument mischaracterizes the Ordinance.

It is true that once the government opens up a forum, it may not discriminate on the basis of viewpoint. *Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 96 (1972). But, the Ordinance does not do so. The identifying mark exception

differentiates only as to the medium used for the expression–i.e., identifying marks on aircraft versus towed banners–and not on the basis of any particular viewpoint. For example, the district court posited that the Center could fly a blimp having its own identifying marks, even if its marks contained a political message:

> Plaintiffs complain that, under the wording of the statute, the Goodyear Blimp would be allowed to cruise the skies above Waikiki beach, while their tow-banners would not. This is not discrimination. If Plaintiffs so choose, they too would be permitted to purchase a dirigible or other aircraft, emblazon their own identifying mark on it, and fly above the beach.

Center for Bio-Ethical Reform, 345 F. Supp. 2d at 1137.

Although the Center's hypothetical blimp would be limited to displaying an "identifying mark, trade name, trade insignia, or trademark" that is valid or permissible under the applicable FAA and trademark laws, the Center would nonetheless be as free as Goodyear to fly its own craft with identifying markings. Thus, to the extent permitted by federal law, and having nothing to do with the Ordinance, the Center could employ an "identifying mark" if it were "under the ownership or registration of the aircraft's or the airborne object's owner." § 40-6.1(b)(1). The result is that if the Center has an aircraft or airline and an identifying mark, such as "Pro Life for America" or "Abortion Kills," it too could fly the aircraft over Honolulu's beaches without running afoul of the Ordinance. Of course such a scheme may be subject to federal restrictions that are not before us in this appeal. The Ordinance easily passes the hurdle of viewpoint neutrality.

C. THE ORDINANCE IS REASONABLE

"The reasonableness analysis focuses on whether the limitation is consistent with preserving the property for the purpose to which it is dedicated." *Brown,* 321 F.3d at 1222 (quotation marks omitted). Any limitation must "fulfill a legitimate need[,][y]et, in a nonpublic forum, the restriction need not constitute the least restrictive alternative available." *Preminger,* 422 F.3d at 824.

It is well established that regulation for purposes of preserving aesthetics and promoting safety falls within the legitimate and substantial interests of local governments. *See e.g., Metromedia,* 453 U.S. at 507-08 ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further–traffic safety and the appearance of the city– are substantial governmental goals."); *see also Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 805 (1984) ("It is well settled that the state may legitimately exercise its police powers to advance esthetic values."); *Ackerley Commc'ns of the N.W., Inc. v. Krochalis,* 108 F.3d 1095, 1099 (9th Cir. 1997) ("[T]he Court has continued to rely on its conclusion in *Metromedia* that a city's interest in avoiding visual clutter suffices to justify a prohibition of billboards...."). The government need not provide detailed proof that the regulation advances its purported interests of safety and aesthetics. *Krochalis,* 108 F.3d at 1099-1100 ("As a matter of law Seattle's ordinance, enacted to further the city's interest in esthetics and safety, is a constitutional restriction on commercial speech without detailed proof that the billboard regulation will in fact advance the city's interests.").

The Ordinance fulfills several legitimate needs, including preserving the economically vital scenic beauty of Honolulu

and minimizing traffic safety hazards for motorists and pedestrians. Although both of these goals are surely legitimate, preservation of the visual beauty of Honolulu's coastal and scenic areas is of paramount importance. The district court succinctly emphasized this point:

> To say that the ordinance is designed to mitigate "aesthetic harm" is misleading in Hawaii. In actuality, the ordinance is designed to protect what is perhaps the state's most valuable and fragile economic asset–the natural beauty upon which Hawaii's tourism economy relies. Revenue generated by tourism accounts for almost one quarter of Hawaii's gross domestic product, and almost one third of the state's employment. Studies, and common sense, indicate that the scenic beauty of Hawaii is one of the primary factors weighed by potential visitors when determining whether to spend their vacation dollars in Hawaii or another locale. More than half a billion dollars have been spent in the past five years on improvements to public areas in Waikiki, and a large proportion of these expenditures were for primarily aesthetic enhancements.

Center for Bio-Ethical Reform, 345 F. Supp. 2d at 1134.

These legitimate needs are also consistent with the purposes to which Honolulu has dedicated the airspace–aesthetic enhancement of the community and reduction of visual distractions for travelers on the ground.[4] Although the

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[4] The airspace also has the obvious purpose of air travel, but this is an area which the FAA has plenary power to regulate. We therefore look only to the scope of purposes for which Honolulu has

legitimate needs and the purposes are congruent, it does not mean this inquiry is circular. Rather, it shows that, under the Ordinance, Honolulu has regulated the airspace to accomplish its legitimate purposes.

The Center's suggestion that the Ordinance's identifying mark exception belies these purposes because aircraft painted with trademarks would certainly upset the aesthetics and produce visual distractions is both speculative and a non sequitur. Does the Center suggest that only an ordinance prohibiting all aircraft or all aircraft markings would be permissible? Honolulu's regulatory authority does not require it to exercise that power in a pristine, perfect sense, only in a reasonable manner. In other words, nothing requires Honolulu to turn the airspace into an air wilderness zone. Nor could it do so, given the FAA's plenary power over the airspace. Significantly, nothing in this record supports any claim that the Ordinance was aimed at the Center or its message. *See Taxpayers for Vincent,* 466 U.S. at 804 (prohibition of sign on public property upheld in part because "there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance" and "[t]here is no claim that the ordinance was designed to suppress certain ideas that the City finds distasteful or that it has been applied to appellees because of the views that they express."). We conclude that the Ordinance is reasonable.

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the ability to regulate.

D. THE ORDINANCE DOES NOT FORECLOSE A TRADITIONALLY IMPORTANT MEDIUM OF COMMUNICATION OR LEAVE THE CENTER WITHOUT A PRACTICAL SUBSTITUTE

We consider one final point in our First Amendment analysis. Citing *City of Ladue v. Gilleo,* 512 U.S. 43 (1994), the Center argues that the Ordinance violates the First Amendment because it forecloses an entire medium of communication, namely banner towing. We disagree.

In *One World One Family Now v. City and County of Honolulu,* 76 F.3d 1009 (9th Cir. 1996), we examined *Ladue,* and underscored several key aspects of the opinion that are of particular import to the present appeal. As we explained in *One World:*

> In *Ladue,* the Court struck down a broad ban on the display of signs on private residential property. The opinion rested heavily on the view that the city's ordinance closed off a "unique and important" mode of expression for which there is "no practical substitute." The Court explained that "[d]isplaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means."
>
> ...
>
> A message on one's person or home has a unique effect because it "provide[s] information about the identity of the 'speaker' [which is] an important component of many attempts to persuade."

76 F.3d at 1015 (citations omitted).

Ladue was concerned with the elimination of "a common means of speaking," 512 U.S. at 55, that was "a distinct and traditionally important medium of expression," *id.* at 57 n. 16, that had a unique ability to "provide information about the identity of the 'speaker,'" *id.* at 56, and that in light of these special attributes had "no practical substitute," *id.* at 57. Banner towing possesses none of these attributes.

Banner towing is neither a common means of speaking nor a distinct and traditionally important form of expression. *Compare id.* at 55 (striking down ban on traditionally important residential signs and reciting cases protecting other traditionally important mediums such as distribution of pamphlets and handbills and door to door dissemination of literature) *with Lee,* 505 U.S. at 680 (holding that an airport is not a public forum in part because of "the lateness with which the modern air terminal has made its appearance" and the refusal of airport operators to intentionally open them to speech activity).

The Center does not argue, nor could it, that banner towing provides a unique ability to convey information about the speaker's identity. As observed by the district court, banner towing achieves the opposite result: "[*Ladue*] dealt with communication by an individual through means that tied the message to the speaker's identity. This [scenario] is precisely the opposite of what [the Center] seeks: a means by which to insulate itself from its unwilling audience." *Center for Bio-Ethical Reform,* 345 F. Supp. 2d at 1135.

Faced with these difficulties, the Center bases its argument almost entirely on the "no practical substitute" prong, arguing that the remaining modes of communication

are inadequate because banner towing is uniquely efficient in expressing the Center's message to the large crowds gathered on the beaches of Honolulu. The Center misreads what is meant by "no practical substitute." *Ladue* teaches that in evaluating the adequacy of substitutes, the court must look to the unique communicative importance of the foreclosed medium in relation to the individual speaker. 512 U.S. at 56. For example, in *Ladue* the unique source identifying ability of a sign in front of an individual's home coupled with the fact that such signs are "unusually cheap and convenient" made other channels of communication unacceptable. *Id.* at 56-57. The Court distinguished how this analysis would differ if the speaker were a business or political organization:

> The precise location of many other kinds of signs (aside from "on-site" signs) is of lesser communicative importance. For example, assuming the audience is similar, a commercial advertiser or campaign publicist is likely to be relatively indifferent between one sign site and another. The elimination of a cheap and handy medium of expression is especially apt to deter *individuals* from communicating their views to the public, for unlike businesses (and even political organizations)[,] individuals generally realize few tangible benefits from such communication.

Id. at 57 n. 15. Unlike the yard signs in *Ladue,* banner towing does not have a unique source-identifying ability. Absent some unique source-identifying ability, the fact that banner towing is inexpensive and efficient, standing alone, does not mean the Ordinance is unconstitutional.

The Supreme Court has already determined that there is no constitutional right to engage in the cheapest, easiest, or most far-reaching form of communication:

> That more people may be more easily and cheaply reached by [a particular means of communication], perhaps borrowed without cost from some zealous supporter, is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.

Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949). Even though the banner may be preferable in its communicative efficiency, there is little likelihood that the Center will be chilled in its efforts to spread its message to its intended audience through ample and adequate alternative channels. *See Ladue,* 512 U.S. at 56-57 & n. 15. The Center has at its disposal a wide range of practical and effective means of communicating its message–from television to direct mail, email, leaflets, hand-held signs and old-fashion stumping, Hyde Park style. We therefore hold that the Ordinance does not violate the First Amendment because it is a reasonable and viewpoint-neutral restriction on speech in a nonpublic forum; as expressed in *Ladue,* the Ordinance does not foreclose a unique and traditionally important mode of expression for which there is no practical substitute.

III. THE ORDINANCE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

"[T]he viability of equal protection claims relating to expressive conduct is contingent upon the existence of a public forum. Only when rights of access associated with a public forum are improperly limited may we conclude that a fundamental right is impinged." *Monterey County Democratic Cent. Comm. v. U.S. Postal Serv.,* 812 F.2d 1194, 1200 (9th Cir. 1987) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 54-55 (1983)).

Because the airspace is a nonpublic forum, the Center has no claim to a fundamental right of access, and the Ordinance need only "rationally further a legitimate state purpose." *Id.* The Ordinance meets this minimal scrutiny, as we have already noted. We also emphasize that, consistent with the Equal Protection Clause, the Ordinance is viewpoint neutral and a reasonable restriction:

> [U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.... This is not to say that all [expressive conduct] must always be allowed. We have continually recognized that reasonable ... regulations ... may be necessary to further significant governmental interests.... [U]nder an equal protection analysis, there may be sufficient regulatory interests justifying selective exclusions or distinctions....

Mosley, 408 U.S. at 96-98 (citations omitted). For these reasons, the Ordinance passes constitutional scrutiny.

CONCLUSION

The district court properly granted Honolulu's motion for summary judgment. Federal law does not preempt the Ordinance. Nor does the Ordinance violate the First Amendment or the Equal Protection Clause of the Fourteenth Amendment. Honolulu's airspace is a nonpublic forum, and the Ordinance is reasonable, viewpoint neutral, and rationally related to legitimate governmental interests.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

NO. CV03-00154

[Filed November 9, 2004]

CENTER FOR BIO-ETHICAL REFORM, INC., and GREGG CUNNINGHAM,
Plaintiffs,

vs.

CITY AND COUNTY OF HONOLULU, a municipal entity, PETER CARLISLE, in his official capacity as the City and County of Honolulu Prosecuting Attorney, LEE D. DONOHUE, in his official capacity as Chief of Police, Honolulu Police Department,
Defendants.

JUDGES: DAVID ALAN EZRA, CHIEF UNITED STATES DISTRICT JUDGE..

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Court heard Plaintiffs' Motion for Summary Judgment and Defendants' Motion For Summary Judgment on November 8, 2004. Robert J. Muise, Esq., and Robert K. Matsumoto, Esq., appeared at the hearing on behalf of Plaintiffs. Gregory J. Swartz, Esq., and Jon Van Dyke, Esq., appeared at the hearing on behalf of Defendants. After reviewing the motion and the supporting and opposing memoranda, the Court GRANTS Defendants' Motion for Summary Judgment and DENIES Plaintiffs' Motion for Summary Judgment.

BACKGROUND

Plaintiff Center for Bio-Ethical Reform ("CBR") is a pro-life/anti-abortion advocacy group that campaigns to raise public support for legislation outlawing abortion. Plaintiff Cunningham is the executive director of CBR. To communicate its anti-abortion message in heavily populated areas, CBR flies airplanes towing banners that are visible to the crowds below. These aerial tow banners are 100 feet long, and CBR uses them to display very large, graphic, color photographs of aborted fetuses. (Pl. Concise Statement of Facts, ¶ 5.) CBR has employed this publicity tactic in 6 states. Through the use of aerial tow-banner operations, Plaintiffs estimate that they are able to communicate their anti-abortion message to hundreds of thousands of people by simply displaying one banner for approximately five hours. (Compl., ¶ 19.)

Revised Ordinances of Honolulu § 40-6.1 prohibits the use of "any type of aircraft or other self-propelled or buoyant airborne object" to "display in any manner or for any purpose whatsoever any sign or advertising device." A "sign or advertising device" is defined as including "a poster, banner, writing, picture, painting, light, model, display, emblem,

notice, illustration, insignia, symbol or any other form of advertising sign or device." Honolulu Rev. Ord. § 40-6.1(a). The section contains an exception, however, that allows "an identifying mark, trade name, trade insignia, or trademark on the exterior of an aircraft or self-propelled or buoyant airborne object if the displayed item is under the ownership or registration of the aircraft's or the airborne object's owner." Honolulu Rev. Ord. § 40-6.1(b)(1).

Plaintiffs assert that, because the ordinance prevents them from flying their aerial tow banners over the beaches of Honolulu, it violates their rights under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Specifically, Plaintiffs' complaint asserts three claims against the constitutionality and enforceability of the statute. Plaintiffs' first and second claims are asserted under 42 U.S.C. § 1983 for violation of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs assert that because the mainstream media will not carry their provocative photographs, they are forced to seek alternative modes of communication, and these aerial tow banners are the most effective means available to "give any real meaning to the Plaintiffs' exercise of their free speech rights." (Compl., ¶ 13.) Plaintiffs maintain that there are no viable alternative means of communication available that would enable them to express their political message.

Under their third theory of relief, Plaintiffs allege that Defendants cannot enforce the local ordinance because federal regulations have completely preempted local jurisdiction over airspace. Plaintiffs also raised for the first time in their Memorandum in Support of Summary Judgment a fourth theory upon which they claim the ordinance's enforcement against CBR is impermissible. They argue in the alternative that the ordinance is unenforceable against CBR, because

Plaintiffs' tow-banner flights would occur outside of the territorial boundaries and jurisdiction of Honolulu.

PROCEDURAL HISTORY

Plaintiffs CBR and Cunningham filed a complaint seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 on April 4, 2003. On May 20, Plaintiffs filed a Motion for Preliminary Injunction. Defendants Peter Carlisle, Lee D. Donohue, and the City and County of Honolulu responded by filing on June 10 a Motion to Dismiss, alleging lack of standing and ripeness, and an opposition to Plaintiffs' Motion for Preliminary Injunction on July 3. On August 13, 2003, after a hearing, the Court denied Plaintiffs' Motion for Preliminary Injunction as well as Defendants' Motion to Dismiss ("August 13 Order"). Proceedings were stayed while Plaintiffs appealed the order, which was affirmed by the Ninth Circuit on February 17, 2004. Plaintiffs filed a Motion for Summary Judgment on August 25, 2004. Defendants responded with their own Motion for Summary Judgment on September 1.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be entered when:

> [T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). The moving party has the initial burden of demonstrating for the court that there is no genuine

issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)). However, the moving party need not produce evidence negating the existence of an element for which the opposing party will bear the burden of proof at trial. *Id.* at 323.

Once the movant has met its burden, the opposing party has the affirmative burden of coming forward with specific facts evidencing a need for trial. Fed. R. Civ. P. 56(e). The opposing party cannot stand on its pleadings, nor simply assert that it will be able to discredit the movant's evidence at trial. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987); Fed. R. Civ. P. 56(e). There is no genuine issue of fact "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citation omitted).

A material fact is one that may affect the decision, so that the finding of that fact is relevant and necessary to the proceedings. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue is shown to exist if sufficient evidence is presented such that a reasonable fact finder could decide the question in favor of the nonmoving party. *Id.* The evidence submitted by the nonmovant, in opposition to a motion for summary judgment, "is to be believed, and all justifiable inferences are to be drawn in [its] favor." *Id.* at 255. In ruling on a motion for summary judgment, the court must bear in mind the actual quantum and quality of proof necessary to support liability under the applicable law. *Id.* at 254. The court must assess the adequacy of the nonmovant's response and must determine whether the showing the

nonmovant asserts it will make at trial would be sufficient to carry its burden of proof. *See Celotex*, 477 U.S. at 322.

At the summary judgment stage, this court may not make credibility determinations or weigh conflicting evidence. *Musick v. Burke*, 913 F.2d 1390, 1394 (9th Cir. 1990). The standard for determining a motion for summary judgment is the same standard used to determine a motion for directed verdict: whether the evidence presents a sufficient disagreement to require submission to a jury, or it is so one-sided that one party must prevail as a matter of law. *Id.* (citation omitted).

DISCUSSION

I. *The FAA's system of issuing "certificates of waiver" for aerial tow-banner operations does not constitute federal preemption of local regulations such as Honolulu's ban on aerial advertisements*

Plaintiffs contend that Honolulu's ordinance is invalid because it has been preempted by federal law. Specifically, Plaintiffs posit that the local ordinance has been preempted by the Federal Aviation Agency's nationwide policy of requiring would-be tow banner operators to obtain "certificates of waiver" prior to starting operations. The purpose of the FAA is to regulate "the use of the navigable airspace" so as "to ensure the safety of the aircraft and the efficient use of the airspace." (Def. Memo. In Support of Sum. Judg., Ex. J at 2.) To further this mission, it is authorized to issue "air traffic regulations" for:

> (A) navigating, protecting, and identifying aircraft;
> (B) protecting individuals and property on the ground;
> (C) using the navigable airspace efficiently; and

> (D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects

49 U.S.C. § 40103(b)(2). It was pursuant to this statutory authority that the FAA issued 14 C.F.R. § 91.311, which provides that "no pilot of a civil aircraft may tow anything with that aircraft except in accordance with the terms of a certificate of waiver issued by the [FAA]." Moreover, "no person may operate a restricted category civil aircraft within the United States -- (1) over a densely populated area; (2) in a congested airway; or (3) near a busy airport," except as authorized by a certificate of waiver. (Def. Memo. In Support of Sum. Judg., Ex. J at 3 (citing 14 C.F.R. § 91.313(e)(internal punctuation omitted)).) To issue a waiver, the FAA need only find "that the proposed operation can be safely conducted under the terms of that certificate of waiver." *Id.* (citing 14 C.F.R. § 91.903(a)).

Plaintiffs correctly note that, although advertising regulations are traditionally the prerogative of the states as part of their general police power, no presumption of preemption applies in this instance because the ordinance "specifically targets for regulation an area where there has been a history of significant federal presence." (Pl. Memo. In Opp'n, ¶ 9 (citing *Skysign Int'l, Inc. v. Honolulu*, 276 F.3d 1109, 1116 (9th Cir. 2002)).) Thus, this Court proceeds with the standard preemption analysis, which revolves around the finding of Congressional intent. *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992).

A state law that conflicts with federal law is "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). However, the preemption analysis "starts with the assumption that the historic police powers of the States are not to be

superseded by Federal Act unless that is the clear and manifest purpose of Congress." *Cipollone*, 505 U.S. at 516 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Federal preemption will be found: (1) expressly through the explicit terms of the federal statute or action; (2) impliedly when the intent of Congress is clearly manifested or "implicit from a pervasive scheme of federal regulation that leaves no room for state and local supplementation;" or (3) when there is an actual conflict between state and federal law. *See, e.g., Barber v. State of Hawaii*, 42 F.3d 1185, 1189 (9th Cir. 1994).

The issue of whether Honolulu Revised Ordinance § 40-6.1 is federally preempted has already been litigated in this jurisdiction. In *Skysign*, the Ninth Circuit upheld this same Honolulu ordinance against the claims of an aerial provider of commercial advertising who claimed, like Plaintiffs, that the ordinance was federally preempted by the FAA's waiver scheme. 276 F.3d at 1115-1118. The court found that, although the plaintiff in that case cited different federal aviation statutes that did explicitly preempt state action in other circumstances, nothing in the FAA's waiver system constituted express preemption. Turning to the issue of whether Congress had impliedly preempted local regulation by occupying the entire field, the court concluded that regulating certain aspects of air traffic does not alone exclude any state or local regulation of aerial advertising. *Id.* at 1116. "There 'mere volume and complexity' of the FAA's regulatory scheme do not, without some affirmative accompanying indication, compel a conclusion that the agency has sought to accompany the field to the full," the court explained. *Id.* at 1116-17 (citing *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 718-719) ("We are even more reluctant to infer preemption from the comprehensiveness of regulations than from the

comprehensiveness of statutes... To infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive.").

Examining the issue of whether the local ordinance should be invalidated as an impediment to the purposes of the federal law, the court held that, because the ordinance did not regulate flight paths, altitudes, and the like, it did not "encroach upon any of the subfields of aviation over which Congress has actually asserted exclusive authority." *Skysign*, 276 F.3d at 1117. The court found that rather than conflicting, the federal regulations appeared to explicitly account for the existence of concurrent state and local regulation. In reaching this conclusion, the court cited passages from the FAA's handbook for inspectors plainly stating that state and local ordinances are not superceded. *Skysign*, 276 F.3d at 1118. Thus, finding no express preemption, no implied preemption through government dominance of the field, and no conflict between the implementation of the federal and local regulations, the Ninth Circuit concluded that the Honolulu ordinance was enforceable. *Id.*

Plaintiffs assert that *Skysign* is no longer good law because of a change in FAA policy that occurred after that holding was issued. In particular, Plaintiffs base this assertion on an FAA notice issued on October 7, 2002, which deleted the portions of the inspector's handbook that disclaimed preemption of state and local regulations. (Pl. Concise Statement of Facts, Tab 2 at Ex. A.) The notice stated that the sections of the handbook had been deleted because they had

> been misinterpreted to recognize the ability of state or local governments to use their police powers to regulate banner towing and aerial advertising flight operations authorized by the [FAA]. State and local regulation of such flight operations could easily impede Federal policy and purpose and is federally preempted in the circumstances, including but not limited to those in which they regulate operations in navigable airspace.

(Pl. Concise Statement of Facts, Tab 2, Ex. A, Muise Decl.) This notice expired by its own terms in October of 2003. *Id.*

Plaintiffs attempt to bolster this argument by submitting letters issued by FAA representatives that give conflicting answers to the question of whether FAA waiver regulations preempt Honolulu's ordinance. In 1987, the FAA's regional counsel stated that, in his opinion, Honolulu's ordinance was preempted by the FAA's regulations for two reasons: the statutory grant of exclusive control of the navigable airspace to the FAA, and the "comprehensive and pervasive scheme of federal regulation." (Pl. Statement of Facts, Tab 2, Ex. F.) In 1996, FAA's regional counsel reiterated that opinion in a letter to a member of the Honolulu City Council. (Pl. Concise Statement of Facts, Tab 2, Ex. B.)

However, in July of 2003, FAA Deputy Chief Counsel James W. Whitlow issued a strongly contrary statement. (Def. Memo. In Support of Motion, Ex. I.) Whitlow's letter explicitly stated that the changes to the handbook were not aimed at preempting Honolulu's ordinance. *Id.* Instead, he wrote that the ordinance was "not considered to be preempted because it would not constitute a state or local law that dictates or interferes with aircraft flight paths and operations, imposes restrictions on aircraft equipment, or impacts in any

other way the FAA's plenary authority and responsibility to ensure the safe and efficient use of the nation's airspace." *Id.* The FAA based its opinion that the ordinance was not preempted, he wrote, on the fact that the ordinance addressed advertising, "a traditional area of local regulation, rather than regulat[ing] the navigable airspace." *Id.*

This Court sees no evidence that the *Skysign* opinion has been undermined by subsequent developments. Plaintiffs' evidence does tend to show that the FAA has, over time, changed its opinion regarding the federal preemption of local ordinances such as Honolulu's aerial advertising ban. However, the various opinions issued by FAA representatives make clear that the agency now concludes that Honolulu's ordinance is not preempted by the certificates of waiver system. While the FAA's conclusion is not binding upon this Court, it is persuasive.

Furthermore, as the Ninth Circuit explained in *Skysign*, a state law will not by its mere existence be classified as an impediment to federal law enforcement, and therefore invalidated under principles of conflict preemption, when the federal government clearly contemplated co-existence between federal and local regulatory regimes. *Skysign*, 276 F.3d at 1117. In the instant case, the waivers issued by the FAA make clear on their face that they do not intend to preempt state and local regulations. An FAA certificate of waiver obtained by Plaintiffs to allow aerial tow-banner operations in California in August of 2003 -- well after the *Skysign* ruling and the FAA handbook changes cited by Plaintiffs -- states plainly: "This certificate constitutes a waiver of those Federal rules or regulations specifically referred to above. It does not constitute a waiver of any State law or local ordinance." (Def. Memo. In Support of Sum. Judg., Ex. H.) This statement

makes clear that the FAA does contemplate the state and local regulations will exist concurrently with its waiver system.

Moreover, it is apparent that the FAA's regulatory scheme regarding tow banner operations is designed solely to protect public safety and regulate of the amount and flow of air traffic. (Def. Memo. In Support of Sum. Judg., Ex. J at 2-4.) These purposes are entirely separate from the purpose of the Honolulu ordinance, which is primarily to prevent the nuisance that would result if the skies above the city's beaches were congested with airborne advertisers, and to preserve the vital economic asset that exists in Hawaii's natural beauty.

In sum, the facts offered by both Plaintiffs and Defendants indicate that the federal government has neither expressly preempted state and local regulation nor so occupied the field with its waiver system that preemption must be implied. Further, there is no actual conflict between the local ordinance and the federal system. Thus, this Court finds that the ordinance has not been federally preempted.

II. *The Ordinance as applied to CBR does not violate the First Amendment, because it constitutes a reasonable, viewpoint neutral speech restriction in a nonpublic forum*

Plaintiffs' first Constitutional claim asserts that Honolulu's ordinance violates the First Amendment, as applied to the states and their subdivisions under the Fourteenth Amendment and 42 U.S.C. § 1983, because it deprives Plaintiffs of their right to freedom of speech. Because of the paramount importance of "uninhibited, robust, and wide-open" discourse about public issues to our democratic system, laws restricting political demonstrations are subject to careful scrutiny. *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). Plaintiffs' aerial tow banners are without doubt a form of political speech that is

protected by the First Amendment. (See Pl. Statement of Facts, Tab 1, Cunningham Decl., Exs. A, B, C.) As Plaintiffs note, "the fact that the messages conveyed ... may be offensive to their recipients does not deprive them of constitutional protection." (Pl. Memo. In Support of Sum. Judg. at 6 (citing *Hill v. Colorado*, 530 U.S. 703, 715 (2000)).) However, even protected speech is not equally permissible in every place and at all times. *Frisby*, 487 U.S. at 479.

A. *The airspace above the City and County of Honolulu is a non-public forum*

The right to conduct private expressive activity on public or government property depends on whether the property can be categorized as a public forum, a designated public forum, or a nonpublic forum. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995). Public fora are places that have traditionally been open to the public for assembly, demonstration, and debate. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). Public streets and sidewalks are the "archetype of the traditional public forum," because "time out of mind public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (internal punctuation and citations omitted). Designated public fora are those spaces that are not traditionally used for discourse, but have been opened by the government for public expression in some circumstances. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 964 (9th Cir. 1999). A state university, for example, will be considered a designated public forum when administrators have an express policy of making meeting facilities available to registered student organizations. *Widmar v. Vincent*, 454 U.S. 263 (1981).

Nonpublic fora are places that are not by tradition or designation a forum for public communication. *Perry Educ. Ass'n*, 460 U.S. at 45. All public or government property that is not either a traditional or designated public forum will be considered a nonpublic forum. *DiLoreto*, 196 F.3d at 965. Examples of nonpublic fora range from a military base to the lobby of a state or county building. *See, e.g., Greer v. Spock*, 424 U.S. 828 (1976)(holding that despite limited civilian access, along with presence of sidewalks and streets, military base was nonpublic forum); *Grossbaum v. Indianapolis-Marion County Bldg. Authority*, 100 F.3d 1287 (7th Cir. 1996) (upholding content-neutral ban on all private displays).

Plaintiffs argue that the airspace above the City and County of Honolulu is a public forum, or at a minimum, a designated public forum. (Plaintiffs' Memo. In Support of Sum. Judg. at 8.) In support of the notion that the airspace is a public forum, Plaintiffs assert that the airspace must either be thought of as an extension of the public fora of the beaches below, and alternatively that it fits the definition of a public forum because it has traditionally been used for assembly and speech. *Id.* Both of these arguments are without merit. An area does not become a public forum simply because it is adjacent to or visible from a public forum. As the Court explained in its Order of August 13, spatial proximity to a public forum is only determinative if the two areas are physically "indistinguishable." *See, e.g., Boos v. Barry*, 485 U.S. 312, 318 (1988)(sidewalks surrounding embassies indistinguishable from other public sidewalks); *United States v. Grace*, 461 U.S. 171, 177-78 (1983)(sidewalks leading to United States Supreme Court building indistinguishable from other public sidewalks). Unlike the beach below, the skies are not a natural or traditional gathering place for human beings. The airspace and the ground are dissimilar in both physical

characteristics and use, and therefore are not indistinguishable for purposes of forum analysis.

Likewise, Plaintiffs fail in their assertion that the airspace qualifies as a public forum because it is among those places that "have immemorially been held in trust for the use of the public." (Pl. Memo. In Support of Sum. Judg. at 7 (citing *Hague v. CIO*, 307 U.S. 496, 515 (1939)). Plaintiffs assert that, "[f]or as long as aircraft have been able to tow banners, aerial advertising has been a way for people to communicate thoughts at major public gatherings across the United States." While that may be true, "as long as aircraft have been able to tow banners" isn't a great deal of time in relation to our nation's history of political speech. That man is present in the forum of the airspace at all is a relatively recent phenomenon and is brought about only through modern invention. Analogously, when faced with similar claims about the public forum status of airport terminals, the Supreme Court responded, "given the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having 'immemorially ... time out of mind' been held in the public trust and used for purposes of expressive activity." *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 680. *See also, Jacobsen v. Bonine*, 123 F.3d 1272, 1274 (9th Cir. 1997) (holding that interstate rest areas are not public fora because they are "modern creations" and "hardly the kind of public property that has by long tradition ... been devoted to assembly and debate."). Based on its history, its physical characteristics, and its function, the airspace does not have among its principal purposes the free exchange of ideas -- and, thus, it is not a public forum.

Alternatively, Plaintiffs argue that the airspace has become a designated public forum, because, they allege, it

has been "opened for use by the public as a place for expressive activity." (Pl. Memo. In Support of Sum. Judg. at 8 (citing *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45 (1983)).) They claim that the airspace has been opened to expressive activity by the FAA's certificates of waiver, which by themselves would permit Plaintiffs to engage in their expression.

These assertions are plainly false. The Supreme Court has clearly defined the way in which the government creates a designated public forum. As the court explained in *Cornelius v. NAACP Legal Defense and Educational Fund*:

> The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it *intended* to designate a place not traditionally open to assembly and debate as a public forum.

473 U.S. 788, 802 (1985) (internal citations omitted)(emphasis added). The City and County of Honolulu have evidenced clear intent not to open this forum to public discourse. No significant expressive activity in the form of aerial advertising has been permitted in Honolulu for decades. (Def. Memo. In Support of Sum. Judg., Ex. C, Whalen Decl.) Neither party cites any actual instance when expressive activity has been permitted to occur in Honolulu's airspace. The fact that the FAA issues certificates of waiver is not dispositive, because, as aforementioned, the FAA's waiver system neither supercedes local regulations nor waives the requirements of them. Moreover, the FAA's waiver scheme is aimed at insuring the safety of aircraft and the smooth flow

of air traffic; it has nothing to do with the expressive content of airborne objects and therefore cannot constitute a conscious decision to open the skies to expression. (Def. Memo. In Support of Sum. Judg., Ex. J at 2-4.) Thus, the skies above Honolulu have clearly not been opened for this kind of activity.

Moreover, the Supreme Court has said that the nature of the property and its "compatibility with expressive activity" are instructive in determining whether the government intended to create a designated public forum. *Cornelius*, 473 U.S. at 802. The airspace is not naturally compatible with expressive activity. Defendants have put forward evidence that the distraction of aerial advertising would lead to increased accidents amongst drivers, pedestrians, and beach-goers. (Def. Memo. In Support of Sum. Judg., Ex. B., Kim Decl.) Plaintiffs deny this evidence as irrelevant and immaterial, countering with testimony that aerial signs do not actually obstruct the vision of onlookers, and cannot be confused with traffic signals. (Pl. Opp'n to Def. Statement of Facts, Tab-2, Cunningham Dep.) The Court found, however, in the Order of August 13, that aerial displays are distracting and create safety risks for onlookers below. (August 13 Order at 12.) The potential distraction to motorists and pedestrians has already been established in this jurisdiction as a factor weighing against compatibility with expressive activity. *Brown v. Calif. Dept. of Transportation*, 321 F.3d 1217, 1222 (9th Cir. 2003)(holding that fences along highways are not public fora because of the potential distraction to motorists).

The airspace is more properly considered a nonpublic forum. The physical characteristics of the sky and it function as a pathway for transportation have meant that, traditionally, it has not been used for any significant quantum of political

expression. Moreover, due to the pervasive system of local, state, and federal regulations to which the airspace is subject, it has clearly not been designated as a public forum for any expressive purposes. Thus, the ordinance will be subject to the more lenient standard of review employed when examining speech restrictions that occur in nonpublic fora.

B. *Honolulu's ordinance is constitutional because the restraint it imposes on expression reasonable and viewpoint neutral*

Even in nonpublic fora, government restrictions on expression may run afoul of the Constitution. Restraints on expressive activity in nonpublic fora do not violate the First Amendment if such restraints are: (1) "reasonable in light of the purpose served by the forum," and (2) viewpoint neutral. *Brown v. Calif. Dept. of Transportation*, 321 F.3d 1217, 1222 (9th Cir. 2003) (citing *Cornelius*, 473 U.S. at 806).

i. *The ordinance is a reasonable attempt to preserve the natural beauty that is vital to the health of Honolulu's tourism economy*

The "reasonableness analysis focuses on whether the limitation is consistent with preserving the property for the purpose to which it is dedicated." *Brown*, 321 F.3d at 1222 (citing *DiLoreto*, 196 F.3d at 967). Limitations are reasonable if they "fulfill a legitimate need," and there is no requirement that the government employ the least restrictive means of achieving that goal. *ISKCON v. Lee*, 505 U.S. 672, 678 (1999); *Samartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 966-67 (9th Cir. 2002).

Honolulu's ban on aerial advertising serves legitimate needs, including minimization of distractions for passers-by,

and preservation of the natural beauty of Oahu's environment. (Whalen Decl.; Preble Decl.; Kim Decl.) The ordinance is consistent with preserving the airspace for the purpose to which it is dedicated - transportation and the aesthetic enhancement of the community. *Id.*

The Supreme Court has established that the concept of public welfare may be broadly construed to include spiritual, physical, aesthetic, and monetary values. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)). Thus, local governments have a legitimate interest in promoting safety by reducing distractions for motorists and other passers-by. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-09 (1981); *Ackerley Communications of the Northwest, Inc., v. Krochalis*, 108 F.3d 1095 (9th Cir. 1997). Additionally, courts have established that local governments also have a more nebulous interest in improving the general quality of life of their citizenry by "avoiding visual clutter" and "esthetic harm." *See, e.g., Taxpayers for Vincent*, 466 U.S. at 804, 807; *Metromedia*, 453 U.S. at 507-09.

Plaintiffs argue that aesthetics are not sufficient justification for the restriction of political speech. (Pl. Opp. to Def. Statement of Facts at 6 (citing *Schneider v. New Jersey*, 308 U.S. 147, 162-63 (1939)).) To say that the ordinance is designed to mitigate "aesthetic harm" is misleading in Hawaii. In actuality, the ordinance is designed to protect what is perhaps the state's most valuable and fragile economic asset -- the natural beauty upon which Hawaii's tourism economy relies. Revenue generated by tourism accounts for almost one quarter of Hawaii's gross domestic product, and almost one third of the state's employment. (Def. Memo. In Support of Sum. Judg., Whalen Decl., Ex. C.) Studies, and common sense, indicate that the scenic

beauty of Hawaii is one of the primary factors weighed by potential visitors when determining whether to spend their vacation dollars in Hawaii or another locale. (Johnson Decl.; Egged Decl.; Whalen Decl.) More than half a billion dollars have been spent in the past five years on improvements to public areas in Waikiki, and a large proportion of these expenditures were for primarily aesthetic enhancements. (Def. Memo. In Support of Sum. Judg., Whalen Decl., Ex. C.) In light of the dual importance of Honolulu's physical appearance, being both an indicator of quality of life for the city's residents and a vital economic resource, preservation of aesthetic sensibilities is a legitimate government interest sufficient to satisfy this low level of scrutiny.

Plaintiffs also argue that because the ordinance outlaws all tow-banner operations, rather than imposing a permit process similar to that used for parades, it is unreasonable. (Plaint. Memo. In Support of Sum. Judg. at 23 (*citing* Crispin Dep., Tab-4 at 71, 72).) In *City of Ladue v. Gilleo*, which Plaintiffs cite to support this assertion, the Supreme Court invalidated a complete prohibition on the display of signs on private residential property. 512 U.S. 43 (1994). The court was strongly persuaded by the fact that citizens' ability to display their beliefs on their own private, residential property is a "venerable means of communication that is both unique and important." *Id.* at 54. Particular emphasis was placed on our society's long history of communication through such displays, as well as the irreplaceable nature of the right to communicate from one's own home. The court summarized:

> Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent - by eliminating a *common*

> means of speaking, such measures can suppress too much speech.

Id. at 55.

In reaching this conclusion, the court relied on a line of cases that protected an individual's right to distribute pamphlets and handbills, and to engage in door to door dissemination of literature. *See Jamison v. Texas*, 318 U.S. 413 (1943)(handbills); *Martin v. City of Struthers*, 319 U.S. 141 (1943)(door-to-door distribution); *Lovell v. Griffin*, 303 U.S. 444 (1938)(pamphlet distribution). This Court earlier reached a similar conclusion in striking down Honolulu's ban on the display of political signs on one's own private residential property. *Runyon v. Fasi*, 762 F. Supp. 280, 285 (1991).

City of Ladue and its predecessor cases are distinguishable from the case at hand on numerous levels. Aerial tow banners are not a common or longstanding means of communication as are front yard signs, pamphlets, handbills, and door-to-door dissemination of literature. Additionally, as the District Court noted in its Order of August 30, these cases dealt with communication by an individual through means that tied the message to the speaker's identity. This is precisely the opposite of what CBR seeks: a means by which to insulate itself from its unwilling audience. (See Pl. Statement of Facts, Tab 1, Cunningham Decl. ¶¶ 38, 43; Tab 11, Holck Dep. at 12-13, 15-16, 24-27, 30-32.) In that same vein, *City of Ladue* is also distinguishable based on the special consideration accorded to the home as a forum. *City of Ladue*, 512 U.S. at 58 ("A special respect for individual liberty in the home has long been part of our culture and law, ... [and] that principle has special resonance when the government seeks to constrain a person's ability to speak there."). Moreover, the court was

particularly concerned by a total ban on residential signs because, as an "unusually cheap and convenient form of communication," they are a virtually irreplaceable medium for those who lack the resources or mobility to engage in more expensive or physically challenging forms of communication. *Id.* at 57. In contrast, aerial tow banners are not an indispensable means of communication for the common citizen that must be accorded special protection.

The ordinance is also unreasonable, Plaintiffs assert, because it does not allow other sufficient outlets for expression. (Pl. Memo. In Support of Sum. Judg. at 16.) They claim that the other forms of communication available to them -- literature distribution, carrying hand held signs, wearing message-bearing T-shirts, etc. -- are less effective and will not influence public opinion at the levels necessary to alter public policy regarding abortion. (Plaint. Statement of Facts, Tab 1, Cunningham Decl. ¶ 31.)

The Constitution "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981). Indeed, the Supreme Court has established that there is no constitutional right to engage in the cheapest or most far-reaching form of communication possible. "That more people may be more easily and cheaply reached [by a particular means of communication] ... is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open." *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949).

Despite Plaintiffs assertions to the contrary, other easy means of publicity are open to them in Honolulu. Plaintiffs

have used their internet website, their poster displays, speaking engagements, parades, and sign carrying to convey their message to the people of Honolulu. (Holck Dep. at 29-34, 38; *Center for Bio-Ethical Reform v. Comcast-Spectacor, Inc.*, 1999 U.S. Dist. LEXIS 12332, 1999 WL 601014, at *1 (E.D. Pa. 1999).) They also drive a large truck through the city streets that bears their graphic displays on three eight-foot-by-eight-foot panels. (Holck Dep. at 15-17; Cunningham Dep. at 12-14.) This truck has made approximately 500 tours across Oahu over the past two years, with each drive lasting an average of five hours. *Id.* Other anti-abortion protesters have conveyed their message by carrying handheld signs at the State Capitol. (Holck Dep., Tab 4 at 34-37; Cunningham Dep., Tab 3 at ¶ 40.) Plaintiffs claim that these means are less effective, and that they subject their members to conflict with the public. Plaintiffs have available many of the traditional modes of communicating political speech; they cannot claim their Constitutional rights have been violated because one of the more novel albeit effective means of expression has been forbidden. Furthermore, there is no Constitutional right to be insulated from one's unwilling audience. As the District Court concluded in its Order of August 13, "[t]he First Amendment protects dialogue, debate, argument -- the free *exchange* of ideas, and particularly when that exchange may become heated or confrontational." (August 13 Order at 22 (emphasis in original).)

ii. *The ordinance is viewpoint neutral, because it neither differentiates between different messages nor is selectively enforced on the basis of the speaker's point of view*

Because the ordinance constitutes a reasonable restriction on speech in a nonpublic forum, it will be upheld so long as it is viewpoint neutral. "Viewpoint discrimination is a form of content discrimination in which the government targets not

subject matter, but particular views taken by speakers on a subject." *Brown*, 321 F.3d at 1223 (citing *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 980 (9th Cir. 1998)). When classifying restrictions, limitations on "subject matter" refer to broad classes of speech, such as all commercial or noncommercial advertising. *See, e.g., Children of the Rosary*, 154 F.3d at 979, 981 (holding that city's ban on all noncommercial advertising on municipal buses was a reasonable subject matter restriction that was viewpoint neutral). "Viewpoint" restrictions, on the other hand, are those that limit speech with regard to the particular issue the speaker intends to address, or the opinion the speaker holds regarding that issue. *See, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (holding that ban on picketing that exempted labor picketing was unconstitutional viewpoint discrimination). Restrictions based on subject matter, or even speaker identity, are permissible in nonpublic fora so long as they are reasonable and viewpoint neutral. *Cornelius*, 473 U.S. at 806.

Plaintiffs argue that the ordinance discriminates on the basis of content because it allows an exception for marks signifying ownership to be displayed on the bodies of planes. This argument fails. The exception allowing trademarks and trade insignias, etc., to be displayed on the bodies of aircraft is at most a subject matter restriction. It allows an exception for a broad category of speech -- i.e., identifying marks -- and makes no distinctions within that category that would suggest an intent to "suppress certain ideas that the city finds distasteful or that [the ordinance] has been applied [to plaintiffs] because of the views they express." *Taxpayers for Vincent*, 466 U.S. at 804. It is entirely viewpoint neutral. Nothing in its text refers to the viewpoint of the speaker, and neither party has brought any evidence that the statute is selectively enforced. If Plaintiffs, as owners of a plane, would

like to inscribe CBR's name or identifying mark onto the plane's body and fly over Waikiki beach, they could do so freely. Therefore, the ordinance is a reasonable, viewpoint neutral restriction on speech in a nonpublic forum, and it must be upheld by this court.

iii. *The ordinance does not violate Plaintiffs' equal protection rights under the Fourteenth Amendment, because it does not discriminate based on viewpoint*

Plaintiffs argue that Honolulu's ordinance also violates the Equal Protection clause of the Fourteenth Amendment, because it prohibits Plaintiffs' political expression via aerial tow-banners while allowing certain "commercial speech" in the form of trade names, trade insignias, or trademarks. (Pl. Memo. In Support of Sum. Judg. at 25-26.) Once again, Plaintiffs misapprehend the difference viewpoint discrimination -- which is subject to the strictest scrutiny under both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment -- as opposed to subject-matter distinctions, which are allowable in nonpublic fora and are generally subject to lower scrutiny.

The Equal Protection Clause is violated when the government grants the use of a forum to speakers whose views it finds acceptable, but denies access to those wishing to express disfavored or more controversial views. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Likewise, the government may not select issues it deems worthy of discussing or debating in public facilities, while excluding others. *Id.* This rule reflects the underlying policy that there is an "'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." *Id.* Thus, once the government has

made a forum available to some speakers, others may not be prohibited from following suit on the basis of their viewpoint.

As explained above, the ordinance does not differentiate between speakers based on viewpoint, nor has it been selectively enforced. Plaintiffs complain that, under the wording of the statute, the Goodyear Blimp would be allowed to cruise the skies above Waikiki beach, while their tow-banners would not. This is not discrimination. If Plaintiffs so choose, they too would be permitted to purchase a dirigible or other aircraft, emblazon their own identifying mark on it, and fly above the beach. This exception allowing a narrow class of subject-matter -- identifying marks -- is perfectly permissible and does not discriminate on the basis of viewpoint. Therefore, Honolulu's ordinance prohibiting tow banner operations does not violate the Fourteenth Amendment, because it does not discriminate against any speaker or form of speech on the basis of viewpoint.

iv. *This Court does not address whether tow-banner flights over the ocean and airport would be beyond the jurisdiction of Honolulu, because this argument contradicts the facts asserted in Plaintiffs' complaint and fails to satisfy the basic requirement of notice pleading*

In their Memorandum in Support of Summary Judgment, Plaintiffs argue that Defendants cannot enforce the ordinance against CBR because tow-banner operations that fly above the coastal waters and Honolulu airport, over which the state maintains jurisdiction, would be outside of the jurisdiction of the City and County of Honolulu. (Pl. Memo. In Support of Sum. Judg. at 35.) Indeed, they assert that Honolulu's jurisdiction ends on the beach at the high-water mark, and that city and county officials threaten to enforce the ordinance beyond that point. *Id.* To bolster this statement, Plaintiffs cite

the depositions of government representatives who claimed the ability to enforce such flights and testified as to the boundaries of the city and county. *Id.* (citing Crispin Decl. at 37, 55, 60-61, 90-92; Lee Dep. at 56-58, 74-75; Muise Decl., Tab 2 at Ex. E).

After presenting these facts regarding Honolulu's geographic boundaries, the Plaintiffs conclude with the following:

> As a result, Plaintiffs are entitled to prospective and equitable relief by way of a declaration that the application of the Honolulu Ordinance against Plaintiffs for this speech activity violates Plaintiffs' right to freedom of speech and an injunction to prevent Defendants from prohibiting or interfering with Plaintiffs' pro-life speech activity.

(Pl. Memo. in Support of Sum. Judg. at 37.) The aforementioned facts do not lend any support to the assertion that the ordinance is unconstitutional. It would appear from this non sequitur that Plaintiffs are actually arguing in the alternative, as the subject heading above this passage of their memorandum suggests, that the City and County of Honolulu should be enjoined from enforcing the ordinance beyond its territorial limits, regardless of the ordinance's constitutionality.

Federal Rule of Civil Procedure 8(a) requires that Plaintiffs provide merely "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The U.S. Supreme Court has elaborated that a plaintiff "must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002)

(quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Despite the lenience of the modern federal system of notice pleading, plaintiffs must at a minimum allege facts in the pleadings sufficient to place defendants on notice of plaintiffs' claims. "It is too often overlooked that federal pleading is still issue pleading, presenting a definite issue for adjudication." *Padovani v. Bruchhausen*, 293 F.2d 546, 550 (2nd Cir. 1961). Pretrial memoranda and affidavits are not considered to be "pleadings" as the term is used by the Federal Rules of Civil Procedure. *See, e.g., McNair v. Monsanto Co.*, 279 F. Supp. 2d 1290 (M.D. Ga. 2003); *Marsh v. Johnson*, 263 F. Supp. 2d 49 (D.D.C. 2003); *Miller v. Brown & Williamson Tobacco Corp.*, 679 F. Supp. 485 (E.D. Pa. 1988); *Lockert v. Faulkner*, 574 F. Supp. 606, 609 n. 3 (N.D. Ind. 1983).

Plaintiffs CBR and Cunningham did not include any reference to these factual assertions in their original complaint, nor did they seek to amend their complaint to do so. In fact, the complaint states that "Plaintiffs want to engage in their peaceful pro-life demonstrations by displaying their aerial tow banners *within or above the boundaries of Defendant Honolulu.*" (Compl. at ¶ 21 (emphasis added).) Plaintiffs' complaint does not meet the minimal standard of notice that is required to raise this issue. Allowing the Plaintiffs to proceed at this stage with an argument that was raised in a responsive pleading and that is factually contrary to the gravamen of the complaint on file would render even the most lenient notice pleading requirement a nullity. Therefore, this Court does not rule on the issue of whether Plaintiffs' proposed flight path would fall within the jurisdiction of the City and County of Honolulu, or whether, in the event that it did not, Honolulu's ordinance could nonetheless be lawfully enforced against CBR. Rather, this Court's inquiry will proceed to analyze Plaintiffs' claims in

light of their stated intention to conduct tow-banner operations within the jurisdiction of the City and County of Honolulu.

CONCLUSION

In sum, this Court finds that no genuine issue of material fact exists that would necessitate resolution at trial. The evidence offered by both parties shows that the airspace above Honolulu's beaches is a nonpublic forum, because it is neither a traditional public forum, nor has it been designated as such by the government. As the airspace is a nonpublic forum, restrictions on speech within its confines need only be reasonable and viewpoint neutral. Honolulu's ordinance meets this low standard, and therefore complies with the mandate of the First Amendment. Moreover, because the ordinance does not discriminate on the basis of viewpoint, it does not violate the Equal Protection Clause of the Fourteenth Amendment. Finally, the ordinance is not preempted by any federal regulation, because neither express nor implied preemption has occurred, and the ordinance does not otherwise conflict with the implementation of the federal regulatory scheme.

For the reasons stated above, the court GRANTS Defendants' Motion for Summary Judgment, and DENIES Plaintiffs' Motion for Summary Judgment.

IT IS SO ORDERED.

APPENDIX D

Revised Ordinance of Honolulu

Article 6. Aerial Advertising

Sections:

40 6.1 Prohibited Exceptions.
40 6.2 Violation Penalty.

§ 40 6.1 Prohibited Exceptions.

(a) Except as allowed under subsection (b), no person shall use any type of aircraft or other self-propelled or buoyant airborne object to display in any manner or for any purpose whatsoever any sign or advertising device. For the purpose of this section, a "sign or advertising device" includes, but is not limited to, a poster, banner, writing, picture, painting, light, model, display, emblem, notice, illustration, insignia, symbol or any other form of advertising sign or device.

(b) Exceptions.

(1) Subsection (a) shall not prohibit the display of an identifying mark, trade name, trade insignia, or trademark on the exterior of an aircraft or self-propelled or buoyant airborne object if the displayed item is under the ownership or registration of the aircraft's or airborne object's owner.

(2) Subsection (a) shall not prohibit the display of a sign or advertising device placed wholly and visible only within the interior of an aircraft or self-propelled or buoyant airborne object.

(3) Subsection (a) shall not apply to the display of a sign or advertising device when placed on or attached to any ground, building, or structure and subject to regulation under Chapter 21 or 41. Such a sign or advertising device shall be permitted, prohibited, or otherwise regulated as provided under the applicable chapter.

(§ 13-32.1, R.O. 1978 (1983 Ed.); Am. Ord. 96-33)

§ 40 6.2 Violation Penalty.

Any person who violates any provision of this article shall, upon conviction, be punished by a fine not less than $25.00 nor more than $500.00, or by imprisonment not exceeding three months, or by both. (§ 13 32.2, R.O. 1978 (1983 Ed.))

APPENDIX E

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

CERTIFICATE OF AUTHORIZATION

ISSUED TO: CENTER FOR BIOETHICAL REFORM

ADDRESS: P.O. BOX 2339
SANTA FE SPRINGS, CA 90670

This certificate is issued for the operations specifically described hereinafter. No person shall conduct any operation pursuant to the authority of this certificate except in accordance with the standard and special provisions contained in this certificate, and such other requirements of the Federal Aviation Regulations not specifically waived by this certificate.

OPERATIONS AUTHORIZED:
AERIAL ADVERTISEMENT BANNER TOWING

AREA OF OPERATIONS: THE CONTIGUOUS UNITED STATES OF AMERICA, ALASKA, HAWAII and PUERTO RICO.

LIST OF WAIVED REGULATIONS BY SECTION AND TITLE: NONE

STANDARD PROVISIONS

1. A copy of the application made for this certificate shall be attached to and become a part hereof.
2. This certificate shall be presented for inspection upon the request of any authorized representative of the Administrator of the Federal Aviation Administration, or of any State of municipal official charged with the duty of enforcing local laws or regulations.
3. The holder of this certificate shall be responsible for the strict observance of the terms and provisions contained herein.
4. This certificate is nontransferable.

NOTE— This certificate constitutes a waiver of those Federal rules or regulations specifically referred to above. It does not constitute a waiver of any State law or local ordinance.

SPECIAL PROVISIONS

Special Provisions Nos. 1 to 16, inclusive, are set forth on the attached pages.

This certificate is effective from 08/31/2003 to 08/31/2005, inclusive, and is subject to cancellation at any time upon notice by the Administrator or his authorized representative.

BY DIRECTION OF THE ADMINISTRATOR
/s/
Linda E. Silvertooth
Manager, LGB FSDO

Western Pacific Region
August 31, 2003
Reissued February 22, 2005

SPECIAL PROVISIONS FOR BANNER TOW OPERATIONS

1. All banner tow operations shall be conducted in VFR weather conditions as required by 14 CFR part 91, § 91.155. Operations shall be conducted only between the hours of official sunrise and official sunset.

2. The certificate holder shall obtain the airport manager's approval to conduct banner tow operations at that respective airport. This Waiver/Authorization does not set aside any standing rules regarding airspace. The appropriate airport traffic control tower, ATC facility, FSS or other designated controlling authority shall be notified prior to conducting banner towing operations within Class B, C or D airspace or within any other controlled or restricted area. Proper clearance must always be obtained.

3. If the airport involved has an FAA control tower, the holder shall coordinate all banner tow operations and operate in coordination with the FAA control tower during banner tow operations.

4. Operations that are conducted above 10,000 feet MSL or inside a Class B Airspace veil (30 NM miles from the primary airport) must have a transponder with Mode C, or an authorization to deviate obtained from the appropriate ATC facility.

5. Appropriate airport officials will be notified in advance when banner tow operations will be in close proximity to an uncontrolled airport. Banner towing operations, except for its own takeoffs and landings, must avoid the traffic area immediately surrounding any airport along its route of flight.

6. Tow attachment and release mechanisms on the aircraft shall be approved by the FAA. Tow lines and banners shall consist of nonmetallic material, except for small ring loops, spars, thimbles, shackles, and light dural spreader rods for assembly and stiffening.

7. A thorough inspection of the aircraft and special equipment shall be made prior to each day's operation.

8. Only essential crewmembers will be carded during banner tow operations. No pilot shall be used under the terms of this Waiver/Authorization until he has received training by the holder in the provisions of this Waiver/Authorization and the pilot signs that he has received the training and understands the provisions and conditions of this Waiver / authorization.

9. When banner tow operations are conducted around congested areas, due care will be exercised so that, in the event of emergency release of the banner and/or tow rope, it will not cause undue hazard to persons or property on the surface.

10. Banner pickup or banner drop should be in a predesignated area not closer than 500 feet to taxiways, runways, persons, buildings, parked automobiles, and other aircraft whenever possible. If the tow plane lands with the banner attached, due care should be exercised to avoid obstacles and endangering other aircraft in the air or persons, property, or aircraft on the surface.

11. Only the aircraft on the attached list may be used under the terms of this certificate while being flown by the pilot(s) listed. The certificating FSDO must be notified in writing of any changes to the attached lists at least 5 days in advance of the first date the aircraft or pilot is scheduled to operate.

12. Only qualified commercial pilots will be used in this operation. Pilots with no documented previous banner tow experience will be given instructions in the procedures and towing operations. The training will be given by an experienced banner tow pilot and will be documented.

13. When banner tow operations are conducted around congested areas, due care will be exercised so that, in the event of emergency release of the banner and/or tow rope, it will not cause undue hazard to persons or property on the surface.

14. For operations outside the geographic area of the issuing FSDO or operating in another FSDO's jurisdiction under a "Contiguous United States" authorization, the operator will coordinate with the appropriate jurisdictional FSDO in advance. If there are special provisions for the added geographic area, those provisions will be added to those originally issued by the original certificating FSDO. The operator will comply with all special provisions attached to its authorization.

15. Only the aircraft on the attached list shall be used under the terms of this certificate, while being flown by pilot(s) listed. The certificate office must be notified in writing of any additions or deletions to the attached lists. A current copy of the following is to be carried onboard all aircraft:

1. Certificate of Waiver or Authorization, and
2. List of all approved pilots and aircraft.

16. All operations must be conducted in compliance with current NOTAMS and/or Waiver/Authorizations issued by the FAA or the Transportation Security Administration (TSA).

ISSUED TO:	CENTER FOR BIOETHICAL REFORM
DATE ISSUED:	August 31, 2003
VALID:	08/31/2003 to 08/31/2005
ISSUED BY:	Long Beach FSDO

APPENDIX F

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

NOTICE

N 8700.16

10/7/02

Cancellation Date 10/7/03

SUBJ: PROCEDURES FOR COMPLETION OF AUTHORIZATIONS FOR BANNER TOWING OPERATIONS

1. PURPOSE. This notice provides guidance regarding the issuance of FAA Form 7711-1, Certificate of Waiver or Authorization, for banner towing operations described in Order 8700.1, General Aviation Operations Inspector's Handbook.

2. DISTRIBUTION. This notice is distributed to the branch level in the Flight Standards Service in Washington headquarters; to the Regulatory Standards Division at the Mike Monroney Aeronautical Center; to the regional Flight Standards divisions; and to all Flight Standards District Offices. This notice is also distributed electronically to all FAA Flight Standards District Offices.

3. BACKGROUND. The current Order 8700.1, volume 2, chapter 45, Issue a Certificate of Waiver or Authorization: Section 91.311 (Banner Towing), contains statements that have been misinterpreted to recognize the ability of State or local governments to use their police powers to regulate banner towing and aerial advertising flight operations authorized by the Federal Aviation Administration (FAA) in accordance with FAA Form 7711-1. State and local regulation of such flight operations could easily impede Federal policy and purpose and is federally preempted in circumstances including but not limited to those in which they regulate operations in the navigable airspace. State and local regulations would affect airspace management, aircraft flights, and operations, particularly where FAA has issued regulations concerning the activity in question. State or local regulations would undermine nationwide uniformity and have a negative effect on interstate commerce. This notice revises Order 8700.1, volume 2, chapter 45, to delete these statements and the revised text will be included in Order 8700.1, Change 24. Change 24 is presently in draft form and to be published before the cancellation date of Notice N 8700.16.

4. CHANGES. Order 8700.1, volume 2, chapter 45, Change 24, deletes the following:

a. Chapter 45, section 1, paragraph 9B(2), "*Ordinances*. The operator is responsible for acquiring knowledge of State and local ordinances that may prohibit or restrict banner tow operations. FSDO knowledge of such State and local ordinances is helpful in assisting applicants."

b. Chapter 45, figure 45-3, Sample of Special Provisions for Banner Tow Operations, item 11, "This certificate and

these special provisions do not supersede any local, State or city ordinances(s) prohibiting aerial advertising."

c. Any other variations of the language inserted by inspectors should be removed.

5. PROCEDURES. The information that is provided in this notice is intended to delete the above verbiage from the current guidance. All offices should review current authorizations, revise as appropriate, and apply this guidance to new applications.

6. INFORMATION. Any questions or requests for additional information should be directed to the Operations and Safety Program Support Branch, AFS-820, at (202) 267-8194.

/s/ Lou Cusimano
James J. Ballough
Director, Flight Standards Service

APPENDIX G

CHAPTER 45. ISSUE A CERTIFICATE OF WAIVER OR AUTHORIZATION: SECTION 91.311 (BANNER TOWING)

SECTION 1. BACKGROUND

1. PROGRAM TRACKING AND REPORTING SUBSYSTEM (PTRS) ACTIVITY CODE: 1220.

2. OBJECTIVE. The objective of this task is to determine if an applicant is eligible for issuance of a certificate of waiver or authorization for banner tow operations. Successful completion of this task results in issuance of a certificate or disapproval of the application.

3. GENERAL.

A. Authority. Title 14 of the Code of Federal Regulations (14 CFR) part 91, § 91.311, provides for the issuance of a Certificate of Waiver or Authorization for aircraft banner tow operations.

B. Definition. A banner is an advertising medium supported by a temporary framework attached externally to the aircraft and towed behind the aircraft.

C. Eligibility. Operators of either standard or restricted category aircraft may apply for a certificate to engage in banner tow operations. Operators of restricted category

aircraft may also be required to operate under the provisions of a waiver to part 91, § 91.313(e).

D. Federal Statutory Mandates. See Appendix 5, Reference Information: Public Laws Associated with Tasks of this Handbook, for guidance regarding applicable statutory mandates for banner tow operations. Please note: This information is subject to change or cancellation.

E. Forms Used. Federal Aviation Administration (FAA) Form 7711-2, Application for a Certificate of Waiver or Authorization (Figure 45-1), is a multipurpose form used to apply for FAA Form 7711-1, Certificate of Waiver or Authorization (Figure 45-2). The items that apply to banner tow operations are listed in section 2, paragraph 3C.

F. Submission. An applicant requesting a certificate is responsible for the completion and submission of FAA Form 7711-2. The application should be submitted a minimum of 30 days before the banner tow activity will take place.

G. Approval or Disapproval.

(1) Applications for banner tow operations are processed at the Flight Standards District Office (FSDO) having jurisdiction over the area where the banner tow operator's principal business office is located. An approved FAA Form 7711-1 or disapproval of the application must be issued by the FSDO as soon as possible after receipt of the application. Upon approval, FAA Form 7711-2 becomes a part of FAA Form 7711-1. The FSDO manager or a designated representative signs the certificate upon approval.

(2) When an operator is issued an authorization for a specific geographic area and wishes to operate in another

geographic area, there is no need to issue another authorization. The original issuing FSDO will amend the authorization to include the new jurisdiction by amending the authorization, keeping the original expiration date. If the operator wishes to operate nationally, it is acceptable to issue an authorization for the "Contiguous United States."

H. Expiration. FAA Form 7711-1 expires 24 calendar-months from the date of issuance. A certificate may be reissued after a properly completed FAA Form 7711-2 is submitted to and processed by the FSDO.

I. Change of Status of FAA Form 7711-1. Since the events of September 11, 2001, and the development of new security standards associated with temporary flight restrictions (TFR) over major events, it is now necessary to assure that the issuance of authorizations for banner tow operations are listed on the regional list of banner tow authorizations available to Transportation Security Administration (TSA) through the FAA Regional TSA Liaison aviation safety inspector (ASI). TSA, in coordination with air traffic control facilities, issues waivers to operate within that airspace. In a recent incident, a TSA waiver was issued to an operator whose previous FAA authorization had expired or was rescinded. With increased security concerns, TSA needs to have a complete listing of current banner tow authorization holders and immediate notification of status changes (i.e., termination, expiration, or revocation). If there are questions or concerns regarding the authorization or airspace, contact the FAA regional liaison ASI.

J. Vital Information Subsystem (VIS) Office File. The inspector should establish an operator VIS record of all operators issued certificates, except for those operators issued a certificate for a one-time operation.

4. REVIEW OF FAA FORM 7711-2. Upon receipt, the application should be reviewed for obvious discrepancies. The information submitted by the applicant on FAA Form 7711-2 must not be altered by the issuing office. In the event the application is not correct, it should be returned to the applicant immediately.

A. Items 1 and 2. If the applicant is a representative of an organization, the organization's name should appear in item 1. The name of the individual and his/her position or authority to represent the organization (e.g., the "responsible person") should appear in item 2. If the applicant is not representing others, the term "N/A" should be entered in item 1 and the applicant's name entered in item 2.

B. Item 4. A pilot of a civil aircraft may conduct banner tow operations in accordance with a Certificate of Waiver or Authorization issued by the Administrator.

C. Item 5. It is sufficient for the applicant to use the term "aerial advertising/banner tow operations" to describe the type of operation.

D. Item 6. The applicant should list the geographic area(s) where the banner tow operation will be conducted. If the operator has a national operation, it is acceptable to issue an authorization for the "Contiguous United States." If the operator wishes to include those states or territories outside the contiguous United States, such as Alaska or Puerto Rico, simply add them.

E. Item 7. The applicant should list the dates for the banner tow operation in this item. The dates requested must not exceed 24 calendar-months. In cases involving one-time operations where the applicant has not indicated an alternate

date, the inspector should advise the applicant to request alternate dates in order to prevent the need for reapplication.

F. Item 8. At the time the application is submitted, the applicant may not know the names of the pilots or the aircraft to be used in a particular banner tow operation. The application may be accepted with a notation in item 8 that a list will be provided at a later specified date. This list must be presented before the certificate is issued.

5. CERTIFICATE ISSUANCE.

A. Inspector Considerations.

(1) Banners. The inspector must determine whether the banner will create a hazard to persons or property if deliberately or inadvertently dropped. It should be noted that a banner tow operation is conducted "around" an open air assembly rather than "over" an open air assembly of persons, so the likelihood of dropping a lead banner pole on an assembly of persons is reduced. Most banners are constructed so that they perform as a self contained parachute with the weighted lead pole descending at an arrested rate when released.

(2) Competency.

(a) Pilot Competency. The inspector must be satisfied that all pilots listed on the application are competent to perform their duties by confirming each pilot has:

- A reliable record of past experience
- Demonstration of sample pickup to a FSDO operations inspector

- A reliable record of successful completion of a banner towing training program

(b) Operator Competency. At least one pickup and drop of the maximum number of letters (panels) to be used by the certificate holder must be demonstrated. This demonstration should be observed from the ground to allow the inspector to evaluate the competence of any essential ground personnel as well as the flight operation.

(3) Pilot Credentials. When banner tow operations are conducted for compensation or hire, the pilot must have at least a limited commercial pilot certificate (without an instrument rating) and at least a valid second class medical certificate. An instrument rating is not a requirement for this operation.

(4) Role of Ground Personnel. Satisfactory coordination of ground crew signals can be critical to banner tow operations. Ground crews lay out the banner, elevate the top of the lead pole for pickup, retrieve the banner after the drop, and, if necessary, signal the correct approach to the pilot.

B. Guidelines for Issuance of the Certificate.

(1) Altitude. Requests for exemptions to the minimum safe altitudes of part 91, § 91.119 must be denied without exception.

(2) Ordinances. The operator is responsible for acquiring knowledge of State and local ordinances that may prohibit or restrict banner tow operations. FSDO knowledge of such State and local ordinances is helpful in assisting applicants.

(a) If an issue or question arises concerning State or local government regulations that have the purpose or the effect of regulating FAA authorized banner towing in a manner that would affect airspace management or aircraft flight and operations, or that would otherwise interfere with Federal policies or regulations, the inspector must immediately contact the Regional Counsel's Office. That office, in coordination with the Office of the Chief Counsel, FAA Headquarters, has responsibility for responding to the issue or question.

(b) The inspector must *not* insert into the "Special Provisions" section of FAA Form 7711-1 any language relating to the application of State or local law (including regulations, ordinances, etc.) to banner tow operations authorized by the certificate, including the legal responsibilities of banner tow operators to comply with State or local regulations prohibiting or restricting banner tow operations.

(c) On the first page of the Certificate of Waiver or Authorization Form 7711-1, below "Standard Provisions" and directly above "Special Provisions" appears a "NOTE" concerning waiver of State law or local regulations. This boilerplate "NOTE" has no legal effect and should be disregarded by inspectors. This is a disclaimer of responsibility by the FAA for the enforcement of State or local ordinances. Direct any questions received concerning this "NOTE" to the Regional Counsel's Office.

(d) The FAA does not regulate the content or messages displayed on banners towed by aircraft. Contact the Regional Counsel's Office for further information.

(e) Site Inspection. Before the initial issuance of a certificate to engage in banner tow, the inspector should conduct a site inspection.

(3) Geographic Area. The authorized geographic area should be limited to the issuing FSDO's geographic area. If the applicant has requested operations outside of the jurisdictional FSDO, the issuing FSDO must amend the authorization to include the requested jurisdiction as well as assure that there is coordination between the affected FSDO(s). The noncertificating FSDO should be made aware of operations in its district. While it is the operator's responsibility to make the notification, the FSDO that issued the certificate should follow-up to ensure that the non-certificating FSDO was informed. It is the operator's responsibility to contact the added jurisdictional FSDO to be issued whatever special provisions necessary that may be specific to that geographic area.

C. Banner Pickup and Drop. Some airports are not large enough for the pilot to maneuver into a proper wind orientation and do not have a staging area suitable for banner tow operations. Therefore, the inspector must ensure that pickups and drops can be made without compromising the safety of persons, equipment, or property on the surface. The pickup and drop must be in an area free from use by the public, employees other than ground crew, and from property on the surface. Preferably, the pickup and drop area should be located away from active runways and taxiways, unless the banner tow operator has an agreement with the airport operator to use these areas. If a runway or taxiway is used, the banner tow operator and the airport operator should cooperate in the preparation of an appropriate notice to airmen (NOTAM). The airport should have a clear approach path to the drop area that allows a safe banner drop operation.

The operator should take into account the lowest point, on the trailing banner when determining a helicopter's correct flight altitude. For safety purposes, the altitude should be sufficient for the aircraft and trailing banner to comply with § 91.119(b)(c). Some banners may extend more than 250 feet behind the aircraft.

(1) Pickup. During pickups, a moderately steep maximum performance climb should be used to snatch the banner and avoid dragging it. In no case should the lead pole contact the ground after pickup.

(a) Aerial Pickup. The banner should be laid out flat on the ground within 30 degrees to the wind. Check the attach points at the top of the poles to ensure that the rope will slip off the top smoothly. The slip loop should travel freely so the grapple hook can engage and tighten the slip hook.

APPENDIX H

U.S. Department of Transportation
Federal Aviation Administration
800 Independence Ave., S.W.
Washington. D.C. 20591

JUL 31 2003

The Honorable Daniel K. Inouye
United States Senate
Washington, D.C. 20510

Dear Senator Inouye:

Administrator Blakey has asked me to respond to your July 7 letter concerning a recent notice issued by the Federal Aviation Administration (FAA) relating to banner towing operations. You inquired whether the notice preempts a local Honolulu ordinance relating to aerial advertising.

On October 7, 2002, the FAA issued a notice concerning "Procedures for Completion of Authorizations for Banner Towing Operations" to amend the current General Aviation Operations Inspector's Handbook (FAA Order 8700.1). As you know, the Notice deleted two provisions from the Handbook. The first stated that "[t]he operator is responsible for acquiring knowledge of State and local ordinances that may prohibit or restrict banner tow operations. FSDO [Flight Standards District Office] knowledge of such State and local ordinances is helpful in assisting applicants." The second

indicated that the FAA's permission to tow a banner "do[es] not supersede any local, State or city ordinance(s) prohibiting aerial advertising." The notice also required that "[a]ny other variations of the language [relating to State and local ordinances] inserted by inspectors should be removed."

The FAA does not interpret these changes (contained in the "Background" section of the October 7 Notice) to preempt § 40-6.1 of the Revised Ordinances of Honolulu, "Aerial Advertising Prohibition." We realize that the City and County of Honolulu is attempting to address advertising, a traditional area of local regulation, rather than regulate the navigable airspace. One important factor is that Honolulu has enacted comprehensive land use regulations, directed to many forms of signage and advertising. For example, in addition to § 40-6.1, Honolulu regulates signage generally under § 21-7.30 and prohibits vehicular advertising under § 41-14.2. We would have a concern if a State or local government singled out aerial advertising for prohibition while permitting similar ground-based advertising since this could be interpreted as an attempt to control the navigable airspace.

Section § 40-6.1 would not considered to be preempted because it would not constitute a State or local law that dictates or interferes with aircraft flight paths and operations, imposes restrictions on aircraft equipment, or impacts in any other way the FAA's plenary authority and responsibility to ensure the safe and efficient use of the nation's airspace. We also do not consider § 40-6.1 to have the purpose or the effect of regulating FAA-authorized banner towing and aerial advertising in a manner that would directly or indirectly affect airspace management or aircraft flight and operations, or that would otherwise impede Federal policies or regulations.

However, State or local regulations purporting to govern banner towing or aerial advertising with respect to flight path, altitude, or aircraft equipment would be preempted. State or local regulations that have the effect of totally banning or unreasonably restricting banner towing would also be preempted since such regulations have the practical effect of barring aircraft operations that have been authorized under Individual Certificates of Waiver or Authorization issued by the FAA.

Please be advised that representatives from the FAA are currently in the process of drafting revised language to clarify the "Background" section of the October 7 Notice.

You are no doubt aware of *Skysign International, Inc. v. City and County of Honolulu,* 276 F.3d 1109 (9th Cir. 2002), in which the court held that the application of Honolulu's ordinances (§ 40-6.1 and § 21-7.30) did not impede Federal policy or purpose in issuing Skysign's banner towing waiver authorization. At the request of the court, the United States Government filed an *amicus curiae* brief expressing the view that the Honolulu ordinances are not preempted. As the Government stated in its brief, one of the reasons why §§ 21-7.30 and 40-6.1 of the Revised Ordinances of Honolulu are not preempted is the "unique and isolated geographic setting involved [*i.e.*, "[t]he County of Honolulu comprises the City of Honolulu and all of Oahu"], where similar laws of other jurisdictions are unlikely to apply to the activity at issue." A copy of the brief is enclosed for your information.

Finally, the FAA does not regulate the content or messages displayed on banners towed by aircraft, and State and local regulations that address the content of banners therefore are not preempted so long as such regulations are not so pervasive

that, as a practical matter, they impede the implementation of Federal aviation policies or regulations.

We expect to issue the revised notice shortly.

If you have any further questions, please do not hesitate to contact myself at (202) 267-3222 or Jonathan Cross of my staff at (202) 267-7173.

Sincerely,

/s/
James W. Whitlow
Deputy Chief Counsel

Enclosure